

THE HIGH COURT

Record Number: 2019/250 MCA

IN THE MATTER OF THE EUROPEAN COMMUNITIES (ACCESS TO  
INFORMATION ON THE ENVIRONMENT) REGULATIONS 2007 TO 2018

Between:

RIGHT TO KNOW CLG

Appellant

-and-

COMMISSIONER FOR ENVIRONMENTAL INFORMATION

Respondent

-and-

MINISTER FOR COMMUNICATIONS, CLIMATE ACTION AND THE  
ENVIRONMENT, IRELAND AND THE ATTORNEY GENERAL

Respondents

-and-

OFFICE OF THE SECRETARY GENERAL TO THE PRESIDENT OF IRELAND

Notice Party

NOTICE OF MOTION

TAKE NOTICE THAT on the 21 day of ~~October~~ 2019 at 11 o'clock in the forenoon or as soon as may be thereafter, Counsel on behalf of the above-named Appellant with an address at 25 Herbert Place, Dublin 2 shall apply to this Honourable Court, sitting at the Four Courts, Dublin 7, for relief in the following terms:

- a) An Order pursuant to Article 13 of the European Communities (Access to Information on the Environment) Regulations 2007-2018 (the “**Regulations**”) and Order 84C of the Rules of the Superior Courts (the “**Rules**”) setting aside the decision of the Commissioner for Environmental Information (the “**Commissioner**”) made on 17 June 2019 in relation to Case CEI/17/0033 (the “**Decision**”).

- b) A Declaration that the Commissioner erred in law in concluding that, in the circumstances of the case, the Notice Party and the Council of State are excluded from the definition of ‘public authority’ within the meaning of Article 2(2) of Directive 2003/4/EC the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (the “**Directive**”) by virtue of Article 13.8.1° of the Constitution of Ireland (Bunreacht na hÉireann) (the “**Directive**”).
- c) A Declaration that the Office of the Secretary General to the President of Ireland (“**OSGP**”) and Notice Party herein is a public authority for the purposes of Article 2(2) of the Directive and / or Article 3(1) of the Regulations in its own right and on behalf of the Council of State.
- d) A Declaration that the Commissioner erred in law in concluding that the Notice Party is not a public authority within the meaning of Article 3 of the Regulations and / or Article 2(2) of the Directive and that accordingly that accordingly he had no further jurisdiction to review the decision of the Notice Party to refuse the Appellant’s request which was made on 21 June 2017.
- e) A Declaration that the Council of State is a public authority for the purposes of Article 2(2) of the Directive and / or Article (3)(1) of the Regulations and represented by the Notice Party in these proceedings.
- f) A Declaration that the Commissioner misinterpreted and / or misapplied the Presidential immunity in Article 13.8.1° of the Constitution of Ireland (Bunreacht na hÉireann) in determining that the Directive does not apply to the Notice Party (as established by the Presidential Establishment Act 1938) and / or the Council of State which was established by Article 31 of the Constitution of Ireland (Bunreacht na hÉireann).
- g) A Declaration that the Commissioner erred in law in concluding that, due to the doctrine of separation of powers between the organs of government, he did not have

jurisdiction to review any decision by the Council of State under Article 12 of the Regulations.

- h) A Declaration that the European Communities (Access to Information on the Environment) (Amendment) Regulations 2018 (S.I. No.309 of 2018) (the “**2018 Regulations**”) are not necessitated by Article 2(2) of the Directive and, accordingly, are *ultra vires* and, if necessary, invalid having regard to the provisions of Article 15 2 1°, Article 29.4.5° and 6° and Article 40.3.1° and 2° of the Constitution.
- i) A Declaration that the 2018 Regulations cannot be applied retrospectively in circumstances where the request which is the subject of the decision was made to the Notice Party on 21 June 2017 and the administrative review procedure under the primary and secondary legislation applicable to the Commissioner engaged when the 2018 Regulations were made on 27 July 2018.
- j) If necessary or appropriate, an Order remitting the matter to the Commissioner for consideration of whether or not the information requested was environmental information within the meaning of Article 3(1) of the Regulations and / or Article 2(1) of the Directive.
- k) If necessary or appropriate, a Declaration that the Commissioner order the Notice Party to release the requested information to the Appellant.
- l) If necessary, an Order referring question(s) to the Court of Justice of the European Union (“**CJEU**”) pursuant to Article 267 of the Treaty on the Functioning of the European Union (“**TFEU**”) on the correct interpretation of Article 2(1) of the Directive.
- m) Such orders and directions in relation to the prosecution and determination of this appeal as this Court considers necessary.
- n) The costs of this appeal.

**WHICH SAID APPLICATION** shall be grounded on this Notice of Motion and the proof of service thereof, the Affidavit of Ken Foxe and the exhibits thereto, the nature of the case and the reasons to be offered by Counsel the nature of the case and in particular (but without prejudice to the generality of the foregoing) the Appellant refers and relies on the following points of law:

1. The Respondent failed to interpret the definition of ‘public authority’ in Article 3(1) of the Regulations teleologically to achieve the purpose of the Directive and / or the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the “**Aarhus Convention**”), including (but not limited to) the right of access to environmental information held by or for public authorities.
2. The Respondent erred in fact and / or law in concluding that the Notice Party is not a ‘public authority’ within the meaning of Article 3(1) of the Regulations and / or Article 2(2) of the Directive. The Appellant will rely *inter alia* on the doctrine of equivalence given that the Notice Party is an FOI Body under section 6 of the Freedom of Information Act 2014 as determined by the Minister for Public Expenditure and Reform on or about 22 November 2017 and referred to by the Information Commissioner in *Ms X and the Secretary General to the President* (case 170151, 8 March 2018).
3. The Respondent misconstrued, misapplied and / or misinterpreted the definition of ‘public authority’ within the meaning of Article 3(1) of the Regulations and / or Article 2(2) of the Directive.
4. Without prejudice to the generality of the foregoing, the Respondent misinterpreted Article 13.8.1° of the Constitution of Ireland (Bunreacht na hÉireann), insofar as it must be construed in accordance with the Directive.
5. Article 13.8.1 provides that “*The President shall not be answerable to either House of the Oireachtas or to any court for the exercise and performance of the powers and*

*functions of his office or for any act done or purporting to be done by him in the exercise and performance of these powers and functions.”*

6. The Office of the Secretary General to the President of Ireland facilitates the President of Ireland, one of the three constituent organs of the Oireachtas and National Parliament of Ireland and, thereby, the Council of State. The powers of the Oireachtas are circumscribed by Articles 12 and 14 of the Constitution of Ireland (Bunreacht na hÉireann).
7. The duties of the Secretary General to the President under section 6 of the Presidential Establishment Act 1938 shall include the duty of acting as clerk to the Council of State.
8. The Appellant also pleads that the Council of State, which is represented in an administrative capacity by the Notice Party, is a public authority within the meaning of the Directive and falls within the categories defined in Article 2(2) of the Directive and / or Article 3(1) of the Regulations..
9. The Council of the State was established by Article 31 of the Constitution of Ireland (Bunreacht na hÉireann), which provides that: *“There shall be a Council of State to aid and counsel the President on all matters on which the President may consult the said Council in relation to the exercise and performance by him of such of his powers and functions as are by this Constitution expressed to be exercisable and performable after consultation with the Council of State, and to exercise such other functions as are conferred on the said Council by this Constitution.”*
10. The Appellant pleads that the Council of State are public authorities within the meaning of the Directive and fall within the categories defined in Article 2(2)(a) and / or Article 2(2)(b) of the Directive.
11. Article 2(2) of the Directive provides that Member States may provide that the definition of ‘public bodies’ in the Directive *“shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at*

*the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition”.*

12. The information which was sought from the Notice Party / Council of State and which is the subject of the initial request and decision was not sought from the Notice Party and / or Council of State in their judicial or legislative capacity.
13. Insofar as the Council of State is deliberating on whether to advise the President to refer a Bill to the Supreme Court under Article 26 of the Constitution to test its constitutionality, it is acting in a deliberative or advisory role and not in a judicial or legislative capacity. Without prejudice, even if the Council of State is acting in a judicial or legislative capacity this capacity comes to an end once the legislation upon which it is deliberating is enacted or otherwise not subject to a legislative procedure.
14. Article 6 of the Directive provides for two review procedures. Article 6(1) states that *“Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive”* (the “**administrative review procedure**”).
15. Article 6(2) of the Directive states that *“in addition to the review procedure referred to in paragraph 1, Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. Member States may furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse”* (the “**judicial review procedure**”).

16. The administrative review procedure under article 12 of the Regulations provides for an appeal to the Respondent who may review the decision of a public authority to refuse to grant access to environmental information.
17. The judicial review procedure under Article 13 of the Regulations provides for an appeal to the High Court on point of law from the decision of the Commissioner not later than 2 months after notice of the Commissioner's decision was given to the party to the appeal. The Directive has been transposed to provide for a judicial review procedure against the Commissioner rather than the Public Authority.
18. The review procedures in Article 6 of the Directive are not review procedures within the meaning of Article 13.8.1° of the Constitution and do not concern the exercise and performance of the President's powers and functions. The review procedures simply concern whether information which is sought pursuant to the Directive should be released and / or how the Regulations should be interpreted.
19. Any request that is made to the Council of State for information which should be disclosed by the Directive can be processed by the Notice Party, in its capacity as an administrative support.
20. There is no express or implied immunity for the Council of State under Article 13.8.1° or any other provision of the Constitution.
21. The only optional exemptions provided for in the final paragraph Article 2(2) of the Directive which on the date of the request had been transposed into national law was when public bodies or institutions are acting in a judicial or legislative capacity. The information which was requested by the Appellant and which was the subject of the Decision was not information provided to or prepared by the Notice Party or the Council of State when acting in a judicial or legislative capacity.
22. Insofar as Article 2(2) of the Directive does allow Member States to opt to exclude public bodies or institutions from the scope of Article 2(2) of the Directive if their constitutional provisions at the date of adoption of the Directive on the 28 January

2003 made no provision for a review procedure within the meaning of Article 6, the Appellant pleads that the judicial review procedure is a central function of the High Court of Ireland and was conferred by Article 34 of the Constitution of Ireland (Bunreacht na hÉireann).

23. The 2018 Regulations, which came into effect on 27 July 2018, purport to exclude certain public offices from the definition of ‘public authority’ in Article 2(2) of the Directive and / or Article 3(1) of the Regulations, including: (a) the President, (b) the Office of the Secretary General to the President, (c) the Council of State, (d) any Commission for the time being lawfully exercising the powers and performing the duties of the President, or (e) any body when acting in a judicial or legislative capacity.
24. The 2018 Regulations cannot, as a matter of EU law, exempt the Notice Party or the Council of State from the scope of the Directive since neither body has immunity within the parameters of the second sentence of the final paragraph of Article 2(2) of the Directive.
25. The 2018 Regulations came into effect after the initial request was made by the Appellant to the Notice Party and cannot be applied retrospectively such as to exempt the Notice Party from the scope of the Directive.
26. Without prejudice, the 2018 Regulations are not necessitated by the Directive and are *ultra vires* and of no legal effect on the grounds pleaded above.
27. The appeal before the Commissioner under the administrative review procedure under the Regulations was in being and the parties engaged when the 2018 Regulations were made. The provisions of the amendment introduced by Article 2 of the 2018 Regulations do not on their face purport to apply retrospectively to an appeal already in being under the Regulations.
28. To the extent that it is submitted that the true meaning and effect of the 2018 Regulations is to exclude the President, the Office of the Secretary General to the President and the Council of State from the application and reach of the Regulations,



the 2018 Regulations purport, in effect, to determine the appeal before the said Commissioner. In such circumstances, the 2018 Regulations are not necessitated by the Directive and are *ultra vires* and of no legal effect.

29. If necessary, the 2018 Regulations are invalid having regard to the provisions of the Constitution of Ireland (Bunreacht na hÉireann) including Article 15.2.1°, 17 Article 29.4.5° and 6° and Article 40.3.1° and 2° thereof.
30. The appeal raises questions of EU law regarding the Directive and the application of the Regulations, the Constitution, and the Aarhus Convention regarding the request for environmental information the subject matter of the proceedings. In the context of the response from the Commissioner, the Respondents being the Minister for Communications Climate Action and the Environment, Ireland and the Attorney General, and the Notice Party being the Office of the Secretary General to the President of Ireland, a reference to the Court of Justice under Article 267 TFEU may be required for an advisory opinion on the issues of law arising.
31. Pursuant to the provisions of Order 84C of the Rules of the Superior Courts, the declaratory reliefs claimed in the notice of motion describe the points of law on which the Appellant's appeal is made. They concern the Decision of the Commissioner for Environmental Legislation dated the 17 June 2019 and the status thereunder of the Office of the Secretary General to the President of Ireland as a public authority including the duties of acting as clerk to the Council of State under section 7 of the Presidential Establishment Act 1938 under the provisions of the Regulations transposing the Directive on public access to information on the environment and including the Aarhus Convention.
32. Pursuant to the provisions of Order 84C of the Rules of the Superior Courts, the consequential or additional reliefs sought are further described in the Notice of Motion. This includes, if necessary or appropriate, an Order remitting the matter to the Commissioner for consideration of whether or not the information requested was environmental information within the meaning of Article 3(1) of the Regulations and / or Article 2(2) of the Directive; if necessary or appropriate, a Declaration that the Commissioner order the Notice Party to release the requested information to the

Appellant; if necessary, an Order referring question(s) to the Court of Justice of the European Union pursuant to Article 267 TFEU on the correct interpretation of Article 2(2) of the Directive; and such orders and directions in relation to the prosecution and determination of this appeal as this Court considers necessary.

**James O'Reilly SC**

**David Browne BL**

**Fred Logue**

Dated this 25<sup>th</sup> day of July 2019

Signed 

FP Logue Solicitors

8/10 Coke Lane

Smithfield

Dublin 7

Solicitor for the Appellant

**To:** The Chief Registrar

Central Office of the High Court

Four Courts

Dublin 7.

**And to:** The Commissioner for Environmental Information

18 Lower Leeson Street,

Dublin 2

**And to:** The Chief State Solicitor

Osmond House

Ship Street Little, Dublin 8

**And to:** Office of the Secretary General to the President

Áras an Uachtaráin

Phoenix Park

Dublin 8

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**THE HIGH COURT**

**Record Number:**

**IN THE MATTER OF THE EUROPEAN COMMUNITIES (ACCESS TO  
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**Between:**

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**MINISTER FOR COMMUNICATIONS, CLIMATE ACTION AND THE  
ENVIRONMENT, IRELAND AND THE ATTORNEY GENERAL**

**Respondents**

**-and-**

**OFFICE OF THE SECRETARY GENERAL TO THE PRESIDENT OF IRELAND**

**Notice Party**

**ORIGINATING NOTICE OF MOTION  
(ORDER 84C OF THE RULES OF THE SUPERIOR COURTS)**



THE HIGH COURT

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MINISTER FOR COMMUNICATIONS, CLIMATE ACTION AND THE  
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-and-

OFFICE OF THE SECRETARY GENERAL TO THE PRESIDENT OF IRELAND

Notice Party

GROUNDING AFFIDAVIT OF KEN FOXE

**Introduction and standing of the Appellant**

- 1) I am a Director of the Appellant in these proceedings and I make this Affidavit with the authority and consent of the Appellant and from facts within my own knowledge save where otherwise appears and where so appears I believe same to be true.
- 2) I swear this affidavit for the purpose of supporting the Appellant's appeal of a decision of the Respondent of 17 June 2019 which was made under the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the "**Regulations**" or the "AIE Regulations") according to context.

- 3) The Appellant is a company limited by guarantee having company registration number 565565 whose object is to improve, promote and advocate for increased rights of public access to information and was incorporated on 24 July 2015. The Appellant aims to vigorously pursue the public's right to know utilising all tools available including national and international access to information laws in the interests of transparency.
- 4) The Appellant maintains a website at [www.righttoknow.ie](http://www.righttoknow.ie) where it publishes full details of its activities, accounts and other relevant information. The Appellant is directed by myself and my fellow directors, Malachy Browne and Gavin Sheridan both of whom are journalists.
- 5) The documents exhibited to this Affidavit have been incorporated in a single exhibit, indexed and paginated, upon which when stapled together and marked "KF1" I have endorsed my name prior to swearing this affidavit.

### **Background Chronology**

- 6) I believe that on 21 June 2017 the Appellant sent an e-mail to the general information e-mail address for the President of Ireland as well as the head of communication and information at Áras an Uachtaráin/Office of the President of Ireland and Mr Finín Ó Murchú a press officer in the President's Office seeking access to certain records held by the Council of State of Ireland.
- 7) The Appellant requested (a) copies of any submissions, memoranda, briefing notes prepared with regard to the following pieces of legislation, which were considered by the Council of State in relation to the Planning and Development Bill 1999 and Section 24 of the Housing (Miscellaneous Provisions) (No 2) Bill 2001; (b) copies of the minutes of the meetings of the Council of State held with regard to the above pieces of legislation; (c) copies of any communications between the Council of State and the President with regard to the above pieces of legislation and (d) copies of any operating documents or terms of reference prepared in relation to the meetings outlined above. I beg to refer to the correspondence which is exhibited at **Page 1** of the Booklet of Exhibits.

- 8) On 21 July 2017 the Appellant requested an internal review on the basis of the deemed refusal of the original request. The Appellant received an acknowledgment from the Notice Party, but no further response was forthcoming. On 4 September 2017 the Appellant appealed to the office of the Commissioner for Environmental Information (the “**Commissioner**”) on the basis of the deemed refusal of its request at both decision-making stages [Ref. CEI/17/0033]. I beg to refer to the correspondence which is exhibited at **Pages 2 to 6** of the Booklet of Exhibits.
- 9) There was an exchange of correspondence with the Respondent in relation to the appeal which was accepted by the Respondent on 7 September 2017.
- 10) On 4 April 2018 an investigator from the Respondent’s office contacted the Appellant by email to notify it of submissions and material issues arising in the course of the appeal to allow the Appellant the opportunity to reply. The email then went on to set out arguments made by the “Office of the President” as to why the President is not a public authority. The Respondent noted that the Appellant had made a submission in case CEI/17/0017 but noted that this was a separate appeal. The Appellant was given the opportunity to make a written submission before 25 April 2018. The Respondent made its submission on 24 April 2018. I beg to refer to the correspondence and Appellant’s submission of 24 April 2018 which are exhibited at **Pages 7 to 15** of the Booklet of Exhibits.
- 11) Some 6 months later on 19 October 2018 the investigator emailed the Appellant to notify it of material issues arising in the case, i.e. the making of the European Communities (Access to Information on the Environment) (Amendment) Regulations 2018 S.I. No 309 of 2018 which purported to exclude the President and other related bodies from the scope of the definition of “public authority” under the AIE Regulations. A further submission was invited before 2 November 2018.
- 12) I say that the same material issue was notified in respect of two other appeals namely CEI/16/0041 (Department of Defence) and CEI/17/0017 (President).
- 13) The Appellant drafted and made a submission dated 22 October 2018. I beg to refer to the correspondence and submission which are exhibited at **Pages 16 to 20** of the Booklet of Exhibits.

- 14) There was further correspondence between the Appellant and the Respondent between 31 October 2018 and 4 December 2018. In particular the Appellant drew the Respondent's attention to the decision of the Court of Justice of the European Union in case C-378/17 *Workplace Relations Commission* concerning the obligations imposed by EU law on public authorities to disapply provisions of national law which are contrary to EU law. I beg to refer to the correspondence which is exhibited at **Pages 21 to 24** of the Booklet of Exhibits.
- 15) I say that on 14 February 2019 the Appellant emailed the Respondent for an update and pointed out that there had been significant delays. The Respondent's investigator replied on 20 February 2019 to say that she was actively working on the appeal but could not give a timeframe for when it might be brought to conclusion.
- 16) On 20 March 2019, FP Logue Solicitors, acting on behalf of the Appellant, wrote to the Commissioner's office in relation to the appeal (as well as two other appeals lodged by the Appellant) and noted the delay since the deemed refusal was appealed on 4 May 2017. The letter of 20 March 2019 called upon the Commissioner's office to make a decision within 28 days of the letter, failing which the Appellant threatened to bring an application to the High Court for an order of mandamus compelling the decision to be made. I beg to refer to the correspondence of 20 March 2019 which is exhibited at **Pages 25 to 27** of the Booklet of Exhibits.
- 17) Following a reply from the Commissioner's office on 22 March 2019, which indicated that further rounds of submissions would be invited, FP Logue Solicitors wrote to the Commissioner's office on 26 March 2019 and noted that there was no need for a further round of submissions. The letter concluded that with the resources available to the Commissioner's office and bearing in mind its responsibilities to make expeditious and timely decisions the appeals should have been determined by the Commissioner. I beg to refer to the correspondence of 22 and 26 March 2019 which is exhibited at **Pages 28 to 29** of the Booklet of Exhibits.
- 18) Following subsequent correspondence from the Commissioner dated 29 March 2019 enclosing an annex entitled "*Appendix: Notification of new matters and recap on points argued by the parties*", FP Logue Solicitors wrote on 9 April 2019 in relation to the three



appeals. I beg to refer to the correspondence of 29 March and 9 April 2019 which is exhibited at **Pages 30 to 33** of the Booklet of Exhibits.

- 19) In relation to the appeal which is the subject of these proceedings, the letter noted that the President is one of the three constituents of the Oireachtas, the legislature of Ireland, and therefore a public authority and that review under article 6 of AIE Directive is not a review within the meaning of Article 13.8.1° of the Constitution nor does it concern the exercise and performance of the President's powers and functions. The article 6 review simply concerns whether information should be released and/or how the AIE Regulations should be interpreted.
- 20) Secondly, it was noted that there is no question that the President would have to participate personally in any such review or that the review would be concerned with complaints relating to the subject matter of any requested information. It was further noted that any request for information to the President, Council of State or the Office of the Secretary General to the President could be handled administratively and by officials rather than the President directly.
- 21) Thirdly, it was noted that there is no concept of immunity for bodies "integral to the Presidency" and no immunity under the Constitution for such bodies. Even if there was such an immunity the last sentence of article 2(2) of the AIE Directive is optional and not required by EU law.
- 22) There was no immediate response to that correspondence and on 3 May 2019 FP Logue Solicitors wrote to the Commissioner's office and noted that at that stage the appeal had been with the Commissioner's office for 605 days and had still not been determined. The letter reminded the Commissioner that his office was under a duty in accordance with the principle of sincere cooperation and that unless a decision was made within 28 days, the Appellant would bring legal proceedings to compel a decision by the Commissioner's office. I beg to refer to the correspondence of 3 May 2019 which is exhibited at **Pages 43 to 44** of the Booklet of Exhibits.
- 23) On 9 May 2019 FP Logue Solicitors received a response from Elizabeth Dolan, Senior Investigator of the Commissioner's office, which replied in its concluding paragraphs as

follows. *"We note what you say but apart from confirming that we are continuing to work on the cases with a view to having a decision or decisions made by the Commissioner by the end of May 2019, there is nothing that I can usefully add to my response of 29 March 2019.*

*I reject your allegation that there is any "ducking and diving" going on. It is not the threat of legal proceedings that has brought matters to this stage as is clear from our correspondence. Therefore, any attempt to recover costs for engaging in this correspondence will be resisted by the Commissioner. The Office has dealt with the cases as expeditiously as possible and to the best of its ability taking into account the complexity of the issues involved and the resources available to it."*

I beg to refer to the correspondence of 9 May 2019 which is exhibited at **Page 45** of the Booklet of Exhibits.

24) On 29 May 2019, FP Logue solicitors received an email from Lisa Underwood in the Commissioner's office which enclosed the Commissioner's decision in respect of a related decision in CEI/17/0017. The email noted that in relation to CEI/17/0033 (Right to Know CLG and Office of the Secretary General of the President), it was anticipated that the Commissioner would make a decision in due course. A letter was sent in response on 30 May 2019 which noted that at that stage the appeal had been pending for 632 days. I beg to refer to the correspondence of 29 and 30 May 2019 which is exhibited at **Page 46** of the Booklet of Exhibits.

25) Lisa Underwood subsequently emailed FP Logue Solicitors on 17 June 2019 and enclosed a copy of the decision wherein the Commissioner concluded on page 13 that *"...in the circumstances of this case, the OSGP and the Council of State are excluded from the definition of public authority pursuant to Article 13.8.1° of the Constitution and article 3(2)(b) and (c) of the Regulations, and thus, neither is a public authority for the purposes of the Regulations. Accordingly, the OSGP was not obliged to process the appellant's request and I have no further jurisdiction in relation to this matter."* (the "**Decision**"). I beg to refer to the Decision which is exhibited at **Pages 47 to 62** of the Booklet of Exhibits.

- 26) I say that in parallel to the appeal, the Appellant sought access to information concerning S.I. No 209 of 2018 which purported to exclude the President, the Notice Party and other related bodies from the definition of “public authority” under the AIE Regulations. In early August 2018 the Appellant made a request under the AIE Regulations to the Department of Communications, Climate Action and the Environment for copies of records relating to the making of that S.I.
- 27) Access was refused by the Department and this decision was appealed to the Respondent who ultimately made a decision dated 27 March 2019 requiring reconsideration of the refusal in relation to seven identified documents. Upon reconsideration in April 2019 a small number of documents were released to the appellant one of which was an email from Elizabeth Dolan, Office of the Information Commissioner to Terry Dunne, a civil servant in the Department of Communications, Climate Action and the Environment dated the 5 July 2017 concerning the then provisions of the European Communities (Access to the Information on the Environment) Regulations which did not exclude the President. I beg to refer to a copy of this email exhibited at **Pages 63 to 64** of the Booklet of Exhibits.
- 28) I say that until it received a copy of Ms Dolan’s email in April 2019, it was completely unaware that the subject matter of this appeal and other related appeals had been disclosed in this manner to the Minister’s department. Further, the Appellant was never told of the Respondent’s views which were expressed to the Minister’s officials.

### **The Decision of the Commissioner for Environmental Information**

- 29) I have read the Notice of Motion issued pursuant to the provisions of the European Communities (Access to Information on the Environment) Regulations recited in the title to these proceedings. I am advised that the Decision is incorrect as a matter of law and is not consistent with the Aarhus Convention and / or the Access to Information on the Environment (“AIE”) Directive or on the other grounds pleaded in the said Notice of Motion.
- 30) I am advised that in due course further to such directions as may be given by this Honourable Court on the return date to the Notice of Motion, the Appellant’s legal

submissions will be furnished in compliance therewith. The Appellant's legal submissions I am advised are set forth in that context rather than in a grounding affidavit. While the grounds supporting the Appellant's appeal are largely for legal argument, as the journalist who initiated the request leading to the Commissioner's Decision dated the 17 June 2019, I wish to highlight a surprising occurrence during the internal appeal before the Commissioner under the AIE Regulations.

- 31) From the text of the Decision, the Commissioner relied on the fact that Regulations had been made on the 27 July 2018 by the Minister of Government with responsibility for the Office of the Commissioner for Environmental Information under the Ministers and Secretaries Acts . I am advised that the regulations are the European Communities (Access to Information on the Environment) (Amendment) Regulations 2018 (S.I. No.309 of 2018) which purport to exclude (a) the President, (b) the Office of the Secretary General to the President, (c) the Council of State, (d) any Commission for the time being lawfully exercising the powers and performing the duties of the President, or (e) any body when acting in a judicial or legislative capacity from the scope of 'public authority' under the AIE Regulations.
- 32) Given that the request was initially made on the 21 June 2017 and the subsequent delay of almost two years to the day and the Decision of the 17 June 2019 2019, as a journalist I emphasise the fact that the 2018 Regulations seek to exempt the Office of the Secretary General to the President from the scope of the AIE Regulations when an appeal on a request for information regarding the Council of State was pending before the Commissioner.
- 33) This is noted in the Decision of the Commissioner at pages 12 to 13 in the following manner. *"While the Explanatory Note to the 2018 Regulations is not legally binding, I note that it states that the purpose of the Regulations is "to clarify the status of certain offices" under the AIE Regulations. It is likely that the Minister when enacting the 2007 Regulations did not envisage appeals against the President, the Council of State and the OSGP due to Article 13.8.1° of the Constitution. Presumably, it was considered that such clarification was needed as a result of this and other appeals which had been made to my Office. Thus, I accept that the Minister in making the 2018 Regulations clarified the pre-existing legal situation that the Council of State is excluded from the definition of public*

*authority in article 3(1) of the AIE. Accordingly, I accept that article 3(2)(c) of the AIE Regulations (as substituted by the 2018 Regulations) confirmed the situation which was, and is, that the President's immunity for the exercise and performance of the powers and functions of his or her office or for any act done or purporting to be done by him or her in the exercise and performance of his or her powers and functions under Article 13.8.1° of the Constitution extends to include the Council of State and is thus consistent with the AIE Directive in this case, specifically the third provision of Article 2(2)."*

34) I am advised that the Commissioner erred in law in the manner in which he construed the Directive and the validity of the 2018 Regulations. I am advised further that the 2018 Regulations do not appear to be necessitated by the AIE Directive or Ireland's membership of the European Union. Thereby, a question regarding their legality as a matter of public law under both national law and EU law arises which are otherwise described in the declaratory reliefs sought on the grounds set forth in the Notice of Motion served with this affidavit.

35) I am advised that the position adopted by the Notice Party and which was subsequently accepted by the Commissioner is incorrect and contrary to the objectives and meaning of the Aarhus Convention and the AIE Directive. Notwithstanding the Presidential immunity in the Constitution, a decision on an AIE request is an administrative decision and should not be considered to be an exercise of the President's powers and functions as set out in the Constitution.

36) As a journalist, I believe that the administrative support afforded to the Office of the President is also exempt from the scope of the Directive. Any exemptions from the Directive must be narrowly construed and cannot be implied. I am advised that the Commissioner's finding that the President's immunity under Article 13.8.1° of the Constitution necessarily extends to include the OSGP when it is providing the President with the means necessary to carry out his or her powers and functions is incorrect as a matter of European Union law.

37) The Council of State (*An Chomhairle Stáit*) is a body established by Article 31 of the Constitution of Ireland to advise the President of Ireland on the exercise of his powers and has authority to provide for the temporary exercise of the duties of the President in

the event that these cannot be exercised by either the President or the Presidential Commission. The membership of the Council of State is ad hoc and consists of a number of ex officio members of the Government and the Judiciary, former officeholders and nominees of the President of Ireland.

38) For the purposes of this appeal, the Appellant is principally interested in the manner in which the Council of State deliberated on two Bills which were considered by the Council of State, namely the Planning and Bill Development Bill 1999 (Part V of which was referred to the Supreme Court under Article 26 of the Constitution and upheld) and Section 24 of the Housing (Miscellaneous Provisions) (No.2) Bill 2001 (which was signed without a referral).

39) The Commissioner had earlier concluded at page 12 of the Decision that he was *“...satisfied that due to the separation of powers between the organs of government I do not have jurisdiction to review any decision by the Council of State under article 12 of the AIE Regulations. To review any such decision would place an impediment between the President and his or her constitutional advisor, thereby interfering with the exercise and performance of the President’s powers and functions. I consider that compelling the Council of State to be answerable to me in a review under article 12 of the AIE Regulations, which is capable of leading to judicial proceedings before the courts, would be inconsistent with the President’s immunity for the exercise and performance of the powers and functions of his or her office or for any act done or purporting to be done by him or her in the exercise and performance of the powers and functions of his or her office or for any act done or purporting to be done by him or her in the exercise and performance of his or her powers under Article 13.8.1° of the Constitution.”*

40) I am advised that the interpretation of the President’s Constitutional immunity is raised in the Decision dated 17 June 2019 in Case CEI/17/0033 concerning the Council of State under appeal and in the Decision dated the 29 May 2019 in Case CEI/17/0017 concerning the Office of the Secretary General to the President. In the Decision dated the 17 June 2019 appealed in these proceedings, Case CEI/17/0033, the Commissioner followed his earlier Decision in Case CEI/17/0033, concerning the Office of the Secretary General to the President on the interpretation of Article 13.8.1° of the Constitution. On the President’s Constitutional immunity, the Commissioner at page 10 of the Decision under

appeal concluded: *"I find no basis for departing from my analysis in Case CEI/17/0017 in this case. Accordingly, I am satisfied that Article 13.8.1° of the Constitution precludes the President from the review procedure prescribed in article 6 of the AIE Directive for the exercise and performance of the powers and functions of his or her office or for any act done or purporting to be done by him or her in the exercise and performance of his or her powers and functions."*

41) I am advised that legal issues of exceptional complexity and significance are raised in the Commissioner's Decisions in Case CEI/17/0033 concerning the Council of State under appeal in these proceedings and in Case CEI/17/0017 concerning the Office of the Secretary General to the President of Ireland which was followed by the Commissioner in rejecting the Appellant's appeal in these proceedings. I am further advised that this is highlighted by the consideration and eventual rejection of a referral by the Commission to the High Court of any question of law under Article 12 (9) (a) of the AIE Regulations as described in page 13 of the Decision and the significant issue of EU law there described.

42) In the Decision at page 13, the Commissioner concluded that the *"...President's immunity in Article 13.8.1° of the Constitution extends to include the Council of State. I further find that the Council of State is excluded from the definition of public authority under the AIE Regulations, in accordance with Article 3(2)(c) of the Regulations."*

43) While it is fundamentally a question of law, I believe it is inimical to the principles of transparency and disclosure, which are inherent in the Aarhus Convention and the AIE Directive, to exclude the Office of the Secretary General to the President or the Office of the President from the scope and review of the AIE Directive and is not required or justified by the AIE Directive or the provisions in Article 13.8.1° of the Constitution on the grounds pleaded in the Notice of Motion herein.

#### **Relief sought**

44) I would therefore ask this court to grant the declaratory reliefs sought in the Notice of Motion on the grounds set forth therein.

I certify my  
personal knowledge  
of the deponent  
Fred

Sworn before me a practising  
solicitor/~~commissioner for oaths~~ by  
the said Ken Foxe

~~a) who is personally known to me;~~

or

b) who has been personally  
identified to me by Fred Logue,

who is personally known to me and  
who has certified to me his/her  
personal knowledge of the Deponent;

or

~~c) the identity of the Deponent has  
been established by me by reference  
to a~~

containing a photograph of the  
Deponent.

This 8 day of July 2019 at

8/10 Coke Lane  
Smithfield  
Dublin 7

Ken Foxe

Deponent

  
Practising Solicitor/~~Commissioner for Oaths~~

~~DARRAGH O'DEA, SOLICITOR, COREN GRIMES, CAVENDISH HOUSE  
SMITHFIELD, DUBLIN 7~~

Filed on the    day of July 2019 on behalf of the Appellant by FP Logue, Solicitors, 8/10 Coke  
Lane, Smithfield, Dublin 7



**THE HIGH COURT**

Record Number: 2019/

**IN THE MATTER OF THE EUROPEAN COMMUNITIES (ACCESS TO  
INFORMATION ON THE ENVIRONMENT) REGULATIONS 2007 TO 2018**

**Between:**

**RIGHT TO KNOW CLG**

**Appellant**

**-and-**

**COMMISSIONER FOR ENVIRONMENTAL INFORMATION**

**Respondent**

**-and-**

**MINISTER FOR COMMUNICATIONS, CLIMATE ACTION AND THE  
ENVIRONMENT, IRELAND AND THE ATTORNEY GENERAL**

**Respondents**

**-and-**

**OFFICE OF THE SECRETARY GENERAL TO THE PRESIDENT**

**Notice Party**



**THE HIGH COURT**

**Record Number:**

**IN THE MATTER OF THE EUROPEAN COMMUNITIES (ACCESS TO  
INFORMATION ON THE ENVIRONMENT) REGULATIONS 2007 TO 2018**

**Between:**

**RIGHT TO KNOW CLG**

**Appellant**

**-and-**

**COMMISSIONER FOR ENVIRONMENTAL INFORMATION**

**Respondent**

**-and-**

**MINISTER FOR COMMUNICATIONS, CLIMATE ACTION AND THE  
ENVIRONMENT, IRELAND AND THE ATTORNEY GENERAL**

**Respondents**

**-and-**

**OFFICE OF THE SECRETARY GENERAL TO THE PRESIDENT OF IRELAND**

**Notice Party**

**GROUNDING AFFIDAVIT OF KEN FOXE**

Exhibit KF1 referred to in the Affidavit of Ken Foxe



Ken Foxe

  
DARRAGH O'DEA  
Commissioner for Oaths/Practising Solicitor



## **Affidavit of Ken Foxe**

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Right To Know <requests@righttoknow.ie>

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## Request under AIE Regulations

1 message

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Right To Know <requests@righttoknow.ie>

Wed, Jun 21, 2017 at 12:56 PM

To: info@president.ie, hanzomer@president.ie, fininomurchu@president.ie

Dear Sirs,

Under the European Communities (Access to Information on the Environment) Regulations 2007 to 2014, I am seeking the following records held by the Council of State:

- copies of any submissions, memoranda, briefing notes prepared with regard to the following pieces of legislation, which were considered by the Council of State: the Planning and Development Bill 1999, Section 24 of the Housing (Miscellaneous Provisions) (No 2) Bill 2001.
- copies of the minutes of the council meetings held with regard to the above pieces of legislation,
- copies of any communications between the Council of State and the President with regard to the above pieces of legislation
- copies of any operating documents or terms of reference prepared in relation to the meetings outlined above.

For the avoidance of doubt it is considered that the Council of State is a public authority under point (a) of the definition in the AIE Regulations

I would prefer to receive this information electronically,  
Please confirm receipt of this email as soon as is convenient,  
Thank you,  
Ken Foxe

--

Right to Know CLG, Registered in Dublin, Ireland No. 565565  
Registered Office: 25 Herbert Place, Dublin 2  
Directors: G Sheridan, M. Browne



Right To Know <requests@righttoknow.ie>

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## Fwd: Request under AIE Regulations

1 message

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Right To Know <requests@righttoknow.ie>

Fri, Jul 21, 2017 at 1:55 PM

To: [info@president.ie](mailto:info@president.ie), [hanszomer@president.ie](mailto:hanszomer@president.ie), [fininomurchu@president.ie](mailto:fininomurchu@president.ie)

Dear Sirs,

I wish to seek automatic internal review of the following request as it is now a deemed refusal.

Please confirm receipt of email at your earliest convenience,

Thank you,

Ken Foxe

----- Forwarded message -----

From: **Right To Know** <[requests@righttoknow.ie](mailto:requests@righttoknow.ie)>

Date: Wed, Jun 21, 2017 at 1:56 PM

Subject: Request under AIE Regulations

To: [info@president.ie](mailto:info@president.ie), [hanszomer@president.ie](mailto:hanszomer@president.ie), [fininomurchu@president.ie](mailto:fininomurchu@president.ie)

Dear Sirs,

Under the European Communities (Access to Information on the Environment) Regulations 2007 to 2014, I am seeking the following records held by the Council of State:

- copies of any submissions, memoranda, briefing notes prepared with regard to the following pieces of legislation, which were considered by the Council of State: the Planning and Development Bill 1999, Section 24 of the Housing (Miscellaneous Provisions) (No 2) Bill 2001.
- copies of the minutes of the council meetings held with regard to the above pieces of legislation,
- copies of any communications between the Council of State and the President with regard to the above pieces of legislation
- copies of any operating documents or terms of reference prepared in relation to the meetings outlined above.

For the avoidance of doubt it is considered that the Council of State is a public authority under point (a) of the definition in the AIE Regulations

I would prefer to receive this information electronically,  
Please confirm receipt of this email as soon as is convenient,  
Thank you,  
Ken Foxe

---

Right to Know CLG, Registered in Dublin, Ireland No. 565565  
Registered Office: 25 Herbert Place, Dublin 2  
Directors: G Sheridan, M. Browne

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Right to Know CLG, Registered in Dublin, Ireland No. 565565  
Registered Office: 25 Herbert Place, Dublin 2



Directors: G Sheridan, M. Browne



Right To Know <requests@righttoknow.ie>

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## Re: Request under AIE Regulations

1 message

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HansZomer@president.ie <HansZomer@president.ie>  
To: Right To Know <requests@righttoknow.ie>  
Cc: FininOMurchu@president.ie

Fri, Jul 21, 2017 at 2:41 PM

Dear Mr Foxe

Thank you for your message.

Yours sincerely,

Hans Zomer

Hans Zomer  
Head of Communications and Information  
Áras an Uachtaráin  
Ph: +353 1 617 1075  
Mob: +353 87 151 0040  
Email: [hanszomer@president.ie](mailto:hanszomer@president.ie)



Right To Know <requests@righttoknow.ie>

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## Confirmation of your Appeal

1 message

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appeals@oeci.gov.ie <appeals@oeci.gov.ie>  
To: requests@righttoknow.ie

Mon, Sep 4, 2017 at 6:00 PM

### Step 1

Have you submitted a AIE request to the public body concerned? Yes

Public Body Reference Number

N/A

Are you completing this form for somebody else? No

## About you (the person making the application)

Title (Mr Ms Mrs etc)	Mr
First Name	Ken
Surname	Foxe
Address	C/O Right to Know CLG <u>25 Herbert Place</u>
Postcode	Dublin 2
Please contact me by	Phone: No Email: <a href="mailto:requests@righttoknow.ie">requests@righttoknow.ie</a> Post: No

Do you have any special requirements, such as a particular disability, that we may need to consider when replying to you? No

## Step 2. Details of your Appeal to the Commissioner

Appeal Type Standard appeal fee is €50.  
Name of public body to which the AIE request was made Council of State

### Additional information

On June 21, I made a request for the following via the email addresses of the Office of the President, which I understand also to be holder of records relating to the Council of State. In the request, I sought "copies of any submissions, memoranda, briefing notes prepared with regard to the following pieces of legislation, which were considered by the Council of State: the Planning and Development Bill 1999, Section 24 of the Housing (Miscellaneous Provisions) (No 2) Bill 2001; copies of the minutes of the council meetings held with regard to the above pieces of legislation; copies of any communications between the Council of State and the President with regard to the above pieces of legislation; copies of any operating documents or terms of reference prepared in relation to the meetings outlined above." I received no response. On July 21, I submitted a request for review on the basis it was a deemed refusal. I received an acknowledgement of my request from Mr Hans Zomer but have heard nothing further. On the basis that this is now a deemed refusal at both stages, I am seeking a review by the Commissioner.



Right To Know <[requests@righttoknow.ie](mailto:requests@righttoknow.ie)>

## Request for Documents

1 message

Right To Know <requests@righttoknow.ie>  
To: info@ocei.ie

Thu, Sep 7, 2017 at 12:16 PM

Attention of Damien Cahill,  
Hi Damien,  
Please find attached copies of the original request, the original request for internal review, and the only acknowledgement Right to Know received regarding this matter.  
Let me know if you need anything else or have any problems opening these.  
Thanks,  
Ken Foxe

---

Right to Know CLG, Registered in Dublin, Ireland No. 565565  
Registered Office: 25 Herbert Place, Dublin 2  
Directors: G Sheridan, M. Browne



Right To Know  
<requests@righttoknow.ie>

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## Re: Appeal under Access to Information on the Environment (AIE) Regulations 2007 to 2014 (the Regulations)

1 message

info@ocei.ie <info@ocei.ie>  
To: requests@righttoknow.ie

Thu, Sep 7, 2017 at 2:23 PM

Our Reference : CEI/17/0033

07 September 2017

Mr Ken Foxe  
[requests@righttoknow.ie](mailto:requests@righttoknow.ie)

## Re: Appeal under Access to Information on the Environment (AIE) Regulations 2007 to 2014 (the Regulations)

Dear Mr Foxe,

I refer to your appeal to the Commissioner for Environmental Information, received on 04 September 2017, against the decision of the Office of the President in relation to your request under the AIE Regulations for access to information, referenced above.

I have attached a copy of the appeal for your information:

### Acceptance of Appeal

Your appeal has been accepted, and the Commissioner will therefore carry out a review of the decision the Office of the President in this case. You are entitled to make submissions, which the Commissioner will take into account in his review. Any such submissions should be received in this Office by **Friday, 29 September 2017**.

### Scope of Review

Article 12(3) of the Regulations provides for the right of appeal to the Commissioner by a person whose request for environmental information has been refused. Article 11(5)(a) of the Regulations clarifies that a decision to refuse a request for environmental information, which may be appealed to the Commissioner, includes a request that "has been refused on the grounds that the body or person concerned contends that the body or person is not a public authority within the meaning of these Regulations". In this case, as the Office of the President has refused the request on the grounds that it is not a public authority within the meaning of the Regulations, the issue before the Commissioner is whether or not the organisation qualifies as a "public authority" for the purposes of the Regulations.

### Fee


Article 15(3) of the Regulations provides that a fee of €50 must be charged for making an appeal to the Commissioner. In certain circumstances, as provided for in Article 15(4) of the Regulations, a reduced fee of €15 applies. In respect of an appeal to the Commissioner on a decision pursuant to Article 10(7) of the Regulations, i.e. where the original decision was untimely, the Commissioner may waive all or part of the appeal fee (Article 15(6) of the Regulations refers). Otherwise the Regulations do not allow for the acceptance of an appeal where a fee has not been paid.

If you have any queries relating to this matter, please do not hesitate to contact this Office by telephone at + 353 1 6395689 or by email at [info@ocei.ie](mailto:info@ocei.ie)

Please ensure that you quote our reference number CEI/17/0033 in any correspondence related to this appeal.

Yours sincerely,

Damien Cahill  
Office of the Commissioner for Environmental Information

 **cei.17.0033.doc**  
25K



Right To Know <requests@righttoknow.ie>

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**Re: Appeal CEI/17/0033 to the Commissioner for Environmental Information under the European Communities (Access to Information on the Environment) Regulations 2007 to 2014 (the AIE Regulations)**

1 message

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Lisa Underwood <Lisa.Underwood@ocei.ie>  
To: "requests@righttoknow.ie" <requests@righttoknow.ie>

Wed, Apr 4, 2018 at 2:28 PM

**Our reference: CEI/17/0033**

**Re: Appeal CEI/17/0033 to the Commissioner for Environmental Information under the European Communities (Access to Information on the Environment) Regulations 2007 to 2014 (the AIE Regulations)**

Dear Mr Foxe

I refer to your appeal (CEI/17/0033) to the Commissioner for Environmental Information on behalf of Right to Know CLG concerning a request for access to information held by the Council of State relating to the Planning and Development Bill 1999 and section 24 of the Housing (Miscellaneous Provisions) (No 2) Bill 2001 that was made to the Office of the President on 21 June 2017. I am writing to inform you that I am the investigator with the Office of the Commissioner for Environmental Information (OCEI) that has been assigned to work on this case. My role is to review this case and make recommendations to the Commissioner, who will make a decision on the matter.

I note that this request was made on behalf of Right to Know CLG. The purpose of this letter is to notify you of submissions and material issues arising in the course of this appeal, and to allow you an opportunity to reply. The following issues arise:

**Submissions**

The Office of the President contends that the President is not a public authority for the purposes of the AIE Regulations. The Office has submitted the following rationale for this position:

1. Article 6 of Directive 2003/4/EC requires that applicants must have access to a review procedure before a court of law or another independent and impartial body
2. Article 2.2. of Directive 2003/4/EC provides that member states may exclude institutions or bodies from the definition of "public authority" where national constitutional provisions make no provision for a review procedure of such institutions or bodies within the meaning of Article 6
3. Article 13.8.1 of the Irish Constitution precludes the President from being answerable to the courts
4. The President is therefore exempt from the definition of "public authority"

The Office of the President also submitted that the President is exempt from the definition of "public authority" under article 3(2) of the AIE Regulations, as he acts in a legislative capacity in accordance with Article 15 of the Constitution. The Office of the President further contended that the effect of Article 13.8.1 of the Constitution necessarily places the President out of the scope of the AIE regulations, as an AIE request could be appealed to the Courts, contrary to this provision. The Office of the President also noted that the President is not included in the list of indicative bodies set out in the definition of "public authority" in the AIE Regulations.

I note that you made a submission to this Office in CEI/17/0017 Right to Know CLG and Office of the President on 18 September 2017. Please note that the appeal in CEI/17/0017 is separate to this appeal.

I invite you to make a written submission, if there any other relevant issues you wish to bring to the Commissioner's attention you may do in that submission, by the close of business on **Wednesday 25 April 2018**. I will have regard to any submission received by that time, after which time I will proceed to make recommendations to the Commissioner on this appeal.

If you have any queries in relation to this appeal you can contact me directly at [lisa.underwood@ocei.ie](mailto:lisa.underwood@ocei.ie) or 01 639 5754.

Yours sincerely

Lisa Underwood

Lisa Underwood | Investigator | Office of the Commissioner for Environmental Information | 18  
Lower Leeson Street, Dublin 2, D02 HE97 | ☎ 01-639 5754 | Lo-call: 1890 253 238  
| ✉ [Lisa.underwood@ocei.ie](mailto:Lisa.underwood@ocei.ie) | Website: [www.ocei.ie](http://www.ocei.ie)



Right To Know  
<[requests@righttoknow.ie](mailto:requests@righttoknow.ie)>

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**Re: Appeal CEI/17/0033 to the Commissioner for Environmental Information under the European Communities (Access to Information on the Environment) Regulations 2007 to 2014 (the AIE Regulations)**

1 message

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Right To Know <[requests@righttoknow.ie](mailto:requests@righttoknow.ie)>  
To: Lisa Underwood <[Lisa.Underwood@ocei.ie](mailto:Lisa.Underwood@ocei.ie)>

Tue, Apr 24, 2018 at 10:50 AM

Hi Lisa,  
Please find attached Right to Know's submission regarding our AIE request to the Council of State.  
Let me know if you need anything else.  
Thanks  
Ken Foxe

### **Right to Know's submission in case CEI/17/0033-Council of State**

This is a response to an invitation dated 4 April 2018 to make submissions on material issues arising in the course of this appeal and in particular to respond to points raised by the Office of the President.

#### **Request was made to the Council of State, not the President**

R2K does not understand how the status of the President as a public authority is relevant to this request. The request was made to the Council of State. It is presumed that the records of the Council of State are held by a secretariat or other administrative resource, but R2K is not privy to the organisational arrangements for the Council of State. For example, it is noted that the Information Commissioner has determined that the Secretary General to the President is an FOI body for the purposes of the Freedom of Information Act 2014, presumably the request could be answered by the Secretary General or its equivalent in respect of the President.

The fact is the Council of State is established under article 31 of the Constitution and while the President appoints some of its members, it is a distinct and independent public authority. The status of the President is simply irrelevant to the point at issue here.

#### **Status of the President – a complete Red Herring**

For the sake of completeness, in the alternative and strictly without prejudice, R2K sets out why the President is a public authority below.

R2K contends that the President is a public authority under article 3(1)(a) or 3(1)(b) or both. The President, together with the Dáil and the Seanad make up the Oireachtas which is the legislature in Ireland (articles 15.1.2° and 15.2.1° of the Constitution). The President is also the head of state and has certain powers as set out in the Constitution. As such the President is a public authority except when acting in a legislative capacity.

By virtue of the ECJ's decision in case C-204/09 *Flachglas Torgau* the exclusion from the definition of public authority for bodies acting in a legislative capacity only applies as long as the applicable legislative process is in being. When the process has ended the body is considered to be a public authority. The legislation which was the subject matter of this request was passed many years ago so there is no question that the President or the Council of State is now acting in a legislative capacity in relation to that legislation.

It is untrue to say that a right of appeal to the courts in this instance conflicts with article 13.8.1° of the Constitution which provides that the President is not answerable to any court for the exercise and performance of the powers and functions of his office or for any act done or purporting to be done by him in that regard. This provision was interpreted by the High Court in *State (Walshe) v Murphy* [1981] 1 IR 275 where an order of the President appointing a temporary judge to the District Court was challenged. It was contended that article 13.8.1° prevented the Court from reviewing such an order since it was made by the President. The Court held that being "answerable" meant being called before a court and being answerable for one's actions – being "*made or forced to answer or give account of*



*his conduct.*" The Court found that this was not the case in a review of decision based on an order made by the President. If such an immunity from review existed, there would be serious consequences since in many cases the President acts under the direction of the Executive. If such acts were not reviewable the Executive could act unconstitutionally without the possibility of judicial review. By analogy, information relating to acts of the President should be subject to the same rules of transparency as apply to the executive bearing in mind the objectives of the Aarhus Convention and the AIE Directive (Directive 2003/4).

In any event the appearance of the President in court is not at issue here, what is at issue is access to environmental information held by or for the Council of State. There is no possibility that in a statutory appeal or otherwise the President would have to appear in court in relation to the request itself or anything contained in the information.

In any event it must be noted that EU law takes precedence over the Constitution and nothing in the Constitution can be interpreted as disapplying any provision of EU law such as the right to access information on the environment as provided in the AIE Directive.

Without prejudice, in any event, the legislature has decided not to exclude bodies or institutions where there is no review procedure as allowed by article 2.2 of the AIE Directive. This is an optional provision and in deciding not to exercise the option, the Oireachtas clearly intended that such bodies be included in the scope of what is a public authority.

Finally, the Commission will be aware that the indicative list of public authorities in the AIE Regulations (SI 133 of 2007 as amended) does not expand or limit the definition of public authority and each case must be considered with reference to articles 3(1)(a), (b) and (c) (*National Asset Management Agency v. Commissioner for Environmental Information* [2015] IESC 51).

For these reasons the Council of State is incorrect to contend that it is not a public authority for the purpose of this request and therefore he should proceed to deal with it.

24 April 2018



Right To Know <requests@righttoknow.ie>

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**RE: Appeal CEI/17/0033 to the Commissioner for Environmental Information under the European Communities (Access to Information on the Environment) Regulations 2007 to 2014 (the AIE Regulations)**

1 message

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Lisa Underwood <Lisa.Underwood@oeci.ie>  
To: Right To Know <requests@righttoknow.ie>

Tue, Apr 24, 2018 at 11:06 AM

Dear Ken

I wish to acknowledge receipt of your submission in relation to CEI/17/0033.

I will incorporate it in the file relating to this appeal.

I have also invited the Office of the President to make a submission in relation to this appeal.

If any further issues arise in relation to this appeal, or any clarifications are needed, I will contact you to let you know.

If you have any queries in relation to this appeal you can contact me directly at the details below.

Yours sincerely

Lisa Underwood

**Lisa Underwood | Investigator | Office of the Commissioner for Environmental Information | 18  
Lower Leeson Street, Dublin 2, D02 HE97 | ☎ 01-639 5754 | Lo-call: 1890 253 238  
| ✉ [Lisa.underwood@ocei.ie](mailto:Lisa.underwood@ocei.ie) | Website: [www.ocei.ie](http://www.ocei.ie)**

**From:** Right To Know [mailto:[requests@righttoknow.ie](mailto:requests@righttoknow.ie)]

**Sent:** Tuesday 24 April 2018 11:51

**To:** Lisa Underwood <[Lisa.Underwood@ocei.ie](mailto:Lisa.Underwood@ocei.ie)>

**Subject:** Re: Appeal CEI/17/0033 to the Commissioner for Environmental Information under the European Communities (Access to Information on the Environment) Regulations 2007 to 2014 (the AIE Regulations)

Hi Lisa,

Please find attached Right to Know's submission regarding our AIE request to the Council of State.

Let me know if you need anything else.

Thanks

Ken Foxe

On Wed, Apr 4, 2018 at 3:28 PM, Lisa Underwood <[Lisa.Underwood@ocei.ie](mailto:Lisa.Underwood@ocei.ie)> wrote:

Our reference: CEI/17/0033

**Re: Appeal CEI/17/0033 to the Commissioner for Environmental Information under the European Communities (Access to Information on the Environment) Regulations 2007 to 2014 (the AIE Regulations)**

Dear Mr Foxe

I refer to your appeal (CEI/17/0033) to the Commissioner for Environmental Information on behalf of Right to Know CLG concerning a request for access to information held by the Council of State relating to the Planning and Development Bill 1999 and section 24 of the Housing (Miscellaneous Provisions) (No 2) Bill 2001 that was made to the Office of the President on 21 June 2017. I am writing to inform you that I am the investigator with the Office of the Commissioner for Environmental Information (OCEI) that has been assigned to work on this case. My role is to review this case and make recommendations to the Commissioner, who will make a decision on the matter.

I note that this request was made on behalf of Right to Know CLG. The purpose of this letter is to notify you of submissions and material issues arising in the course of this appeal, and to allow you an opportunity to reply. The following issues arise:

**Submissions**

The Office of the President contends that the President is not a public authority for the purposes of the AIE Regulations. The Office has submitted the following rationale for this position:

1. Article 6 of Directive 2003/4/EC requires that applicants must have access to a review procedure before a court of law or another independent and impartial body
2. Article 2.2. of Directive 2003/4/EC provides that member states may exclude institutions or bodies from the definition of "public authority" where national constitutional provisions make no provision for a review procedure of such institutions or bodies within the meaning of Article 6
3. Article 13.8.1 of the Irish Constitution precludes the President from being answerable to the courts

4. The President is therefore exempt from the definition of "public authority"

The Office of the President also submitted that the President is exempt from the definition of "public authority" under article 3(2) of the AIE Regulations, as he acts in a legislative capacity in accordance with Article 15 of the Constitution. The Office of the President further contended that the effect of Article 13.8.1 of the Constitution necessarily places the President out of the scope of the AIE regulations, as an AIE request could be appealed to the Courts, contrary to this provision. The Office of the President also noted that the President is not included in the list of indicative bodies set out in the definition of "public authority" in the AIE Regulations.

I note that you made a submission to this Office in CEI/17/0017 Right to Know CLG and Office of the President on 18 September 2017. Please note that the appeal in CEI/17/0017 is separate to this appeal.

I invite you to make a written submission, if there any other relevant issues you wish to bring to the Commissioner's attention you may do in that submission, by the close of business on **Wednesday 25 April 2018**. I will have regard to any submission received by that time, after which time I will proceed to make recommendations to the Commissioner on this appeal.

If you have any queries in relation to this appeal you can contact me directly at [lisa.underwood@ocei.ie](mailto:lisa.underwood@ocei.ie) or 01 639 5754.

Yours sincerely

Lisa Underwood

**Lisa Underwood | Investigator | Office of the Commissioner for Environmental Information | 18 Lower Leeson Street, Dublin 2, D02 HE97 | ☎ 01-639 5754 | Lo-call: 1890 253 238 | ✉ [Lisa.underwood@ocei.ie](mailto:Lisa.underwood@ocei.ie) | Website: [www.ocei.ie](http://www.ocei.ie)**

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Right to Know CLG, Registered in Dublin, Ireland No. 565565  
Registered Office: 25 Herbert Place, Dublin 2

Directors: G Sheridan, M. Browne



Right To Know <requests@righttoknow.ie>

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**Re: Appeal to the Commissioner for Environmental Information under  
the European Communities (Access to Information on the Environment)  
Regulations 2007 to 2018 (the AIE Regulations) in CEI/17/0033**  
1 message

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Lisa Underwood <Lisa.Underwood@ocei.ie>  
To: "requests@righttoknow.ie" <requests@righttoknow.ie>

Fri, Oct 19, 2018 at 1:38 PM

**Our reference:** CEI/17/0033

Right to Know CLG

c/o Mr Ken Foxe

112 New Cabra Road

Dublin 7

19 October 2018

Dear Mr Foxe

I refer to the above appeal to the Commissioner for Environmental Information in CEI/17/0033.

### **Notification of material issues**

The purpose of this letter is to notify you of material issues arising in relation to this case, and to allow you an opportunity to reply.

I note that the Minister for Communications, Climate Action and Environment signed Statutory Instrument No. 309 of 2018 (European Communities (Access to Information on the Environment) (Amendment) Regulations 2018 (S.I. No. 309 of 2018) on 27 July 2018. S.I. No. 309 of 2018 states that neither the Council of State nor the Office of the President are a public authority for the purposes of the AIE Regulations.

### **Invitation to make a submission**

I would like to invite you to make a submission to this Office to address the effect of S.I. No. 309 of 2018 on this case. I would be obliged if you could provide your submission within 10 working days i.e. by the close of business on **Friday 2 November 2018**.

If you have any queries in relation to this appeal please do not hesitate to contact me by email at [Lisa.Underwood@ocei.ie](mailto:Lisa.Underwood@ocei.ie) or by phone at 01 639 5754.

Yours sincerely

Lisa Underwood

Lisa Underwood | Investigator | Office of the Commissioner for Environmental Information | 18  
Lower Leeson Street, Dublin 2, D02 HE97 | ☎ 01-639 5754 | Lo-call: 1890 253 238  
| ✉ [Lisa.underwood@ocei.ie](mailto:Lisa.underwood@ocei.ie) | Website: [www.ocei.ie](http://www.ocei.ie)



Right To Know  
<requests@righttoknow.ie>

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**Re: Appeal to the Commissioner for Environmental Information under the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the AIE Regulations) in CEI/17/0033**

1 message

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Right To Know <requests@righttoknow.ie>  
To: Lisa Underwood <Lisa.Underwood@oeci.ie>

Mon, Oct 22, 2018 at 11:28 AM

Hi Lisa,  
Please find attached Right to Know's submissions in each of the three following cases: Department of Defence (CEI/16/0041), Office of the President (CEI/17/0017), Council of State (CEI/17/0033).  
Let me know if you need anything else,  
Thanks  
Ken Foxe



**Right to Know CLG and the Council of State  
Case CEI/17/0033**

**Submission by Right to Know (R2K)**

**Introduction**

This submission is made in response to the Investigator's email dated 19 October 2018 in which a submission was invited in relation to SI 309 of 2018 which the investigator "*states that neither the Council of State nor the Office of the President are a public authority for the purposes of the AIE Regulations*"

**Submission**

The investigator is incorrect and there is no reference in the cited SI to the "Office of the President" so it is unclear what point is being advanced here.

It is unclear if this constitutes a new reason justifying a refusal. If it is a new ground for refusal, reasons must be given, in particular outlining how an SI that was made after the request was made and after the refusal was appealed to the Commissioner is relevant.

It is clear from the case law including the decision of the Supreme Court in *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51 that SI 309 of 2018 is invalid and cannot be relied on by the Commissioner because the provisions of this SI are not necessitated by the obligations of membership of the European Union. In that case the making of an SI by a minister constitutes law making by a body other than the Oireachtas and it is not protected by the exception in article 29 of the Constitution.

R2K points out that the neither the President, the Office of Secretary General to the President nor the Council of State meet the criteria in the last sentence of article 2(2) of the AIE Directive that must be satisfied if a member state is to exercise its discretion to exclude certain bodies from the definition of public authority.

In the first instance it is clear that neither the Council of State nor the Office of the Secretary General to the President have any constitutional immunity from a review procedure within the meaning of article 6.

In the case of the President, article 13.8.1° of the Constitution provides the President with partial immunity from review in that he shall not be answerable to either House of the Oireachtas or to any court for the exercise of his powers and functions of his office or for any act done or purporting to be done by him in the exercise and performance of these powers and functions.

A decision on an AIE request is merely an administrative decision and cannot be considered to be the exercise of the President's powers and functions which are set out in the Constitution. Additionally, there is nothing in article 13.8.1° that can be interpreted as preventing a review by the Commissioner within the meaning of article 6 since the Commissioner is not a court and there is nothing in article 13.8.1° that excludes the possibility of an administrative review of a decision under the AIE Regulations by a body such as the Commissioner. Following this logic, if there were to be an appeal against the Commissioner's decision under the AIE Regulations, it would be the Commissioner's decision that would be reviewed by the courts and not the acts of the President.

A further point arises in relation to the Office of Secretary General to the President. This office has been recognised as an FOI Body by the Information Commissioner (Ms X and the Office of the Secretary General to the President No 170151 8 March 2018). Therefore, according to the doctrine of equivalence Ireland cannot treat EU law rights any less favourably than domestic rights. This means that as the Office of Secretary General to the President is an FOI Body it must also be a public authority under the AIE Regulations.

It is therefore obvious that SI 309 of 2018 is invalid and also that its provisions are contrary to the AIE Directive and in particular article 2(2) of that directive.

In that case the Commissioner should state a case to the High Court under article 12(9)(a) of the AIE Regulations to confirm that this SI is invalid and its provisions are contrary to the AIE Directive. It would be a grave breach of R2K's fundamental right of access to information to make a decision refusing access to information based on a statutory instrument that is so obviously invalid.

### **Conclusion**

In all the circumstances the withheld information should be released to R2K since the Council of State is a public authority for the purpose of the AIE Regulations

22.10.2018



Right To Know <requests@righttoknow.ie>

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**RE: Appeal to the Commissioner for Environmental Information under the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the AIE Regulations) in CEI/17/0033**

1 message

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Lisa Underwood <Lisa.Underwood@ocei.ie>

Mon, Oct 22, 2018 at 11:31 AM

To: Right To Know <requests@righttoknow.ie>

Our reference: CEI/16/0041, CEI/17/0017 and CEI/17/0033

Dear Mr Foxe

I wish to acknowledge receipt of Right to Know's submissions in CEI/16/0041, CEI/17/0017 and CEI/17/0033.

The submissions have been noted and incorporated into the relevant case file.

Yours sincerely

Lisa Underwood

Lisa Underwood | Investigator | Office of the Commissioner for Environmental Information | **18**  
**Lower Leeson Street, Dublin 2, D02 HE97** | ☎ 01-639 5754 | Lo-call: 1890 253 238  
| ✉ [Lisa.underwood@ocei.ie](mailto:Lisa.underwood@ocei.ie) | Website: [www.ocei.ie](http://www.ocei.ie)



Right To Know <[requests@righttoknow.ie](mailto:requests@righttoknow.ie)>

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**Re: Appeal to the Commissioner for Environmental Information under the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the AIE Regulations) in CEI/17/0033**

1 message

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Lisa Underwood <[Lisa.Underwood@ocei.ie](mailto:Lisa.Underwood@ocei.ie)>  
To: "requests@righttoknow.ie" <[requests@righttoknow.ie](mailto:requests@righttoknow.ie)>

Wed, Oct 31, 2018 at 4:18 PM

**Our reference:** CEI/17/0033

Dear Mr Foxe

I refer to the above appeal to the Commissioner for Environmental Information in CEI/17/0033.

You are correct in your submission of 22 September 2018 that S.I. No. 309 of 2018 does not state that the Office of the President is not a public authority for the purposes of the AIE Regulations. I would like to clarify that my invitation should have stated that S.I. No. 309 of 2018 states that the President, the Office of the Secretary General to the President and the Council of State are not public authorities for the purposes of the AIE Regulations.

I would also like to clarify that no point was being advanced by my reference to the Office of the President nor has it been put forward as a new ground for refusal. As I notified to you on 4 April 2018 the President's office submitted that the President is not a public authority for the purposes of the AIE Regulations. I also note that you clarified on 24 April 2018 that the request was made to the Council of State albeit through the President's office. It is in this context that I notify you that S.I. No. 309 of 2018 states that the President, the Office of the Secretary General to the President and the Council of State are not public authorities for the purposes of the AIE Regulations.

Please note the contents of your submission have been noted and will be taken into account by the Commissioner.

If you feel it is necessary, you are welcome to make an additional submission to address the above and any other matters or observations that you wish to bring to the Commissioner's attention. If you wish to make a submission, I would ask that it be received by this Office within 10 days of the date of this letter i.e. by the close of business on **Wednesday 14 November 2018** please.

Yours sincerely

Lisa Underwood

Lisa Underwood | Investigator | Office of the Commissioner for Environmental Information | 18  
Lower Leeson Street, Dublin 2, D02 HE97 | ☎ 01-639 5754 | Lo-call: 1890 253 238  
| ✉ [Lisa.underwood@ocel.ie](mailto:Lisa.underwood@ocel.ie) | Website: [www.oci.ie](http://www.oci.ie)



Right To Know <[requests@righttoknow.ie](mailto:requests@righttoknow.ie)>

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## Cases

1 message

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Right To Know <[requests@righttoknow.ie](mailto:requests@righttoknow.ie)>  
To: Lisa Underwood <[Lisa.Underwood@ocel.ie](mailto:Lisa.Underwood@ocel.ie)>

Tue, Dec 4, 2018 at 5:54 PM

Hi Lisa,  
Just a quick note to say that when considering each of CEI/17/0033, CEI/17/0017, and CEI/16/0041, Right to Know would like to draw your attention to the following.  
We believe that this judgment should be taken into account when making a decision in each of these cases:  
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=208381&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=188271>

Thanks  
Ken Foxe  
On behalf of Right to Know CLG

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Right to Know CLG, Registered in Dublin, Ireland No. 565565  
Registered Office: 25 Herbert Place, Dublin 2  
Directors: G Sheridan, M. Browne, K Foxe



Right To Know <requests@righttoknow.ie>

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**RE: Cases**

1 message

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**Lisa Underwood** <Lisa.Underwood@ocei.ie>  
To: Right To Know <requests@righttoknow.ie>

Tue, Dec 4, 2018 at 6:24 PM

Our reference: CEI/16/0041, CEI/17/0017 & CEI/17/0033

Dear Ken

Your correspondence has been noted and incorporated into the case file relating to each of the above referenced cases.

Kind regards

Lisa Underwood

Lisa Underwood | Investigator | Office of the Commissioner for Environmental Information | 18 Lower Leeson Street, Dublin 2, D02 HE97 | ☎ 01-639 5754 | Lo-call: 1890 253 238  
| ✉ [Lisa.underwood@ocei.ie](mailto:Lisa.underwood@ocei.ie) | Website: [www.ocei.ie](http://www.ocei.ie)



Right To Know <requests@righttoknow.ie>

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**Update on CEI/16/0041**

1 message

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Right To Know <requests@righttoknow.ie>  
To: Lisa Underwood <Lisa.Underwood@ocel.ie>

Thu, Feb 14, 2019 at 4:58 PM

Hi Lisa,  
I was wondering if it would be possible to get an update on the status of CEI/16/0041?  
Right to Know is at this very stage very eager to receive a decision in this case.  
As you know, this case has been with the Office of the Commissioner for Environmental Information in one form or another since 2015.  
In the present case, our request for an appeal was lodged in October 2016, close to two and a half years ago.  
Would it also be possible to get an update on cases CEI/17/0017 & CEI/17/0033. They have also been the subject of significant delays in getting a timely decision.  
Thanks  
Ken Foxe

--

Right to Know CLG, Registered in Dublin, Ireland No. 565565  
Registered Office: 25 Herbert Place, Dublin 2  
Directors: G Sheridan, M. Browne, K Foxe



Right To Know <requests@righttoknow.ie>

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## RE: Updates on Cases

1 message

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OCEI Shared Mailbox <info@ocel.ie>  
To: "requests@righttoknow.ie" <requests@righttoknow.ie>

Wed, Feb 20, 2019 at 1:42 PM

Our reference: CEI/16/0041, CEI/17/0017 & CEI/17/0033

Dear Mr Foxe

I refer to your appeals to the Commissioner for Environmental Information in the above-referenced cases and your request for an update on the status of your appeals.

Each of the three cases are assigned to me for investigation and recommendation. I would like to inform you that I am actively working on each of the cases. Unfortunately, however, I am not in a position to provide you

with time frames for when you can expect your cases to be brought to conclusion. I sincerely apologise for the delay.

I would like to assure you that I will keep you updated with any developments in relation to the cases.

In the meantime, if you have any queries, please feel free to contact me by email or by telephone at (01) 639 5754.

Yours sincerely

Lisa Underwood

Lisa Underwood | Investigator | Office of the Commissioner for Environmental Information | **18 Lower Leeson Street, Dublin 2, D02 HE97** | ☎ 01-639 5754 | Lo-call: 1890 253 238  
| ✉ [Lisa.underwood@ocei.ie](mailto:Lisa.underwood@ocei.ie) | Website: [www.ocei.ie](http://www.ocei.ie)

**From:** Right To Know [<mailto:requests@righttoknow.ie>]  
**Sent:** Tuesday 19 February 2019 17:28  
**To:** OCEI Shared Mailbox <[info@ocei.ie](mailto:info@ocei.ie)>  
**Subject:** Updates on Cases

Hi,

I was wondering if it would be possible to get an update on the status of CEI/16/0041?

Right to Know is at this very stage very eager to receive a decision in this case.

As you know, this case has been with the Office of the Commission for Environmental Information in one form or another since 2015.



In the present case, our request for an appeal was lodged in October 2016, close to two and a half years ago.

Would it also be possible to get an update on cases CEI/17/0017 & CEI/17/0033. They have also been the subject of significant delays in getting a timely decision.

Thanks

Ken Foxe

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Right to Know CLG, Registered in Dublin, Ireland No. 565565  
Registered Office: 25 Herbert Place, Dublin 2

Directors: G Sheridan, M. Browne, K Foxe

## FPLOGUE SOLICITORS

Our Reference: FPL/113/02632

Your Reference: CEI/16/0041, CEI/17/0017, CEI/17/0033

20 March 2019

### By email and post

Commissioner for Environmental Information  
18 Lower Leeson Street  
Dublin 2  
info@ocei.ie

### **Access to environmental information and the Department of Defence/President/Council of State**

Dear Sir

We refer to the above matters in which we act for Right to Know CLG. Our client is a company limited by guarantee with its registered office at 25 Herbert Place, Dublin 2.

We refer to the three above matters under your CEI references. Each are appeals under the relevant provisions of the European Communities (Access to Information on the Environment) (Amendment) Regulations 2007 as amended. These national regulations transpose and give further effect to Directive 2003/4/EC on public access to environmental information. Directive 2003/4/EC ensures that EU Law is consistent with the UN Aarhus Convention. The Aarhus Convention in turn applies in national law through EU law and through the transposed national regulations under the European Communities Act 1972 as amended.

### **CEI/16/0041**

We refer to our client's request dated the 12 September 2016 to the Department of Defence under the relevant provisions of the European Communities (Access to Information on the Environment) Regulations 2007 as amended ("the national regulations") for details of Presidential travel undertaken by the Ministerial Air Transport Services for travel by President Mary McAleese and President Michael D Higgins received by the Department on 12 September 2016. This request was refused by the Department of Defence in letters dated 20 September and 7 October 2016.

An appeal to your Office was received on 11 October 2016 and your decision on our client's appeal is awaited.

### **CEI/17/0017**

We refer to our client's request dated the 9 February 2017 under the relevant provisions of the national regulations dated 9 February 2017 for a copy of all records relating to a speech given by the President in Paris in July 2015 at the Summit of Consciences for the Climate and an address at the New Year's greeting ceremony in January 2016.

8/10 Coke Lane  
Smithfield, Dublin 7  
Ireland

Principal: Fred Logue  
Consultant: TJ McIntyre

p: +353 (0)1 531 3510  
f: +353 (0)1 531 3513  
e: info@fplogue.com  
www.fplogue.com

This request resulted in a default refusal at first instance and internal review where no decision was notified as required under the national regulations.

An appeal to your office was received on 4 May 2017 and your decision on our client's appeal is awaited.

**CEI/17/0033**

We refer to our client's request dated the 21 June 2017 under the relevant provisions of the national regulations for copies of records considered by Council of State for the Planning and Development Bill 1999 and for Section 24 of the Housing (Miscellaneous Provisions) (No 2) Bill 2001.

This request resulted in a default refusal at first instance and internal review where no decision was notified as required under the national regulations.

An appeal to your office was received on 4 September 2017 and your decision is awaited.

**Request for decisions to be made**

We refer to these three appeals of our client under the European Communities (Access to Information on the Environment) Regulations 2007 as amended. We refer in particular to Article 12 of the national regulations providing for an appeal to the Office you hold as the Commissioner for Environmental Information.

Pursuant to the national regulations giving further effect to Directive 2003/4/EC we call upon you to determine our client's appeals under the above CEI references quoted in this correspondence.

Under Article 6 of Directive 2003/4/EC on Public Access to Environmental Information which applies to your Office and the transposing national regulations, any national procedure shall be expeditious and be either free of charge or inexpensive. Under article 9(4) of the Aarhus Convention any such appeal should also be timely.

The appeal from the Department of Defence for information on Presidential travel is outstanding from 11 October 2016. The appeal from the President of Ireland on climate speeches is outstanding from 4 May 2017. The appeal from the Council of State on environmental information is outstanding from 4 September 2017.

We call upon you, in reliance on Article 12 of the national regulations, Directive 2003/4/EC including Article 6 thereof and the Aarhus Convention including articles 9(1) and 9(4) thereof to determine our client's appeals and review the respective refusals within a period of 28 days from the date of this letter.

If our client's appeals are not determined by the expiry of this period, an application will be made to the High Court, by way of application for judicial review requesting an order of mandamus, directing you to exercise the appellate jurisdiction of your Office and determine our client's long outstanding appeals.

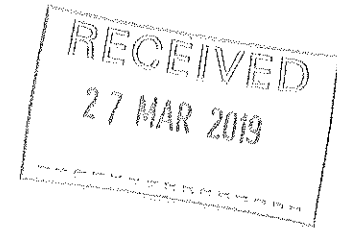
Yours faithfully



**FP LOGUE**



**Coimisinéir um Fhaisnéis Comhshaoil**  
**Commissioner for Environmental Information**



**Our reference:** CEI/16/0041, CEI/17/0017, CEI/17/0033

**Your reference:** FPL/113/02632

**Your client:** Right to Know CLG

FP Logue Solicitors  
8-10 Coke Lane  
Smithfield  
Dublin 7

22 March 2019

**RE: Appeal under Access to Information on the Environment Regulations 2018 (the AIE Regulations) in CEI/16/0041, CEI/17/0017, CEI/17/0033**

Dear Dr Logue,

I refer to the above referenced appeals to the Commissioner for Environmental Information and your recent correspondence to this Office of 20 March 2019, the contents of which have been noted.

I acknowledge that the cases have been with this Office for longer than we would wish. As previously notified to your client, the Department of Defence and the Office of the Secretary General of the President made submissions in these cases raising legal points which require careful consideration. This Office has been considering in great detail the issues which have arisen to date.

Unfortunately, two of the three cases (CEI/16/0041 and CEI/17/0017) had to be re-assigned to a new investigator in December 2017. As previously notified to your client, this was unavoidable as the original investigator is no longer with this Office. Due to other work commitments and the complexity of the issues raised in these cases there was a delay before the new investigator was in a position to make substantive progress in these cases.

In addition, the issues raised in these cases resulted in the Commissioner considering his options including whether it was necessary to refer any questions of law to the High Court for determination pursuant to article 12(9)(a) of the AIE Regulations. A consideration of our options in these cases necessitated our seeking external legal advice.

The difficulties were further compounded by the legal developments which arose during the course of these cases, most notably the adoption of S.I. No. 309 of 2018 European Communities (Access To Information On The Environment) (Amendment) Regulations 2018 which substituted article 3(2) of the AIE Regulations. As a result of this development, it was necessary to seek further submissions from the parties to these cases.

In addition, the Court of Justice of the European Union's judgment in Case C-378/17 Minister for Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations

Commission was submitted to this Office by the appellant in these cases. This is an additional legal development requiring careful consideration.

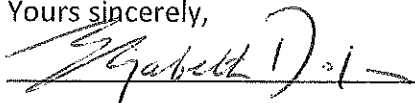
An investigator is currently working on these cases. She is in the process of conducting a detailed examination of the submissions which have been made to date in these cases and of the legal points which have been advanced in those submissions.

I wish to inform you that by Friday 29 March 2019 the investigator will be writing to each of the parties in these cases to notify them all of the issues which have arisen to date in these cases, and to invite them to make further submissions. After that and depending on any other arguments raised in submissions we plan to submit recommendations in these cases to the Commissioner without delay.

It will not be feasible to have the cases determined within 28 days as you request. In the circumstances where these cases are under active consideration, and further submissions will be invited from the relevant parties within a short period of time, there is no justification to proceed to seek a direction from the High Court as you propose.

If, however, your client is dissatisfied with this and wishes to bring legal proceedings, I should point out I cannot see how that could speed-up the work which is underway to bring these cases to conclusion most probably by means of formal decisions as soon as possible. We trust, should you proceed in this manner, that the within letter will be brought to the Court's attention.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Elizabeth Dolan', written over a horizontal line.

Elizabeth Dolan

Senior Investigator  
Office of the Commissioner for Environmental Information

## FPLOGUE SOLICITORS

Our Reference: FPL/113/02632  
Your Reference: CEI/16/0041, CEI/17/0017, CEI/17/0033

26 March 2019

### By email

Commissioner for Environmental Information  
18 Lower Leeson Street  
Dublin 2  
info@ocei.ie

### **Access to environmental information and the Department of Defence/President/Council of State**

Dear Sir

We refer to your letter concerning our client's three long outstanding appeals.

With the resources available to your office and bearing in mind its responsibilities to make expeditious and timely decisions these appeals should have been determined by you notwithstanding the legal issues and personnel changes to which you refer.

The Supreme Court in *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51<sup>1</sup> expressed dissatisfaction with the previous Commissioner's decision to engage in further rounds of submissions rendering that dispute more complex and more entrenched. This *NAMA* case also concerned the definition of public authority under the national regulations and the discretion of the Minister to make regulations in relation to the scope of the definition. The Court indicated that the Commissioner should have addressed the central legal issue in the case through a preliminary reference to the Court of Justice rather than inviting further submissions. The Supreme Court observed that it was not normal for the Commissioner to engage in further rounds of submissions.

With our client's three appeals there have already been two rounds of submissions and there has been ample time for you to take whatever advice is necessary in relation to what are, in essence, points of law. It also seems that you have considered stating a case to the High Court but it is not clear whether or not you intend to do this. That being said, you have had ample opportunity to decide whether or not to exercise your power under article 12(9)(a) of the national regulations and this possibility cannot justify the protracted delays.

There is no need for further submissions, these appeals can and should be advanced to a conclusion within the timeframe specified in our letter dated 20 March 2019.

In the circumstances where these three appeals have been pending for up to two and a half years and you are still unwilling or incapable of committing to make a timely and expeditious decision but have chosen instead to open a new round of submissions injecting further delay into the procedure it seems

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<sup>1</sup> Paragraphs 18 and 19

8/10 Coke Lane  
Smithfield, Dublin 7  
Ireland

Principal: Fred Logue  
Consultant: TJ McIntyre

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e: info@fplogue.com  
www.fplogue.com

to our client that the only option left to it is to seek a judicial remedy as set out in our letter dated 20 March 2019. Unless a decision is made as requested in that letter our client intends to proceed as already indicated.

Yours faithfully

FP Logue

FP LOGUE

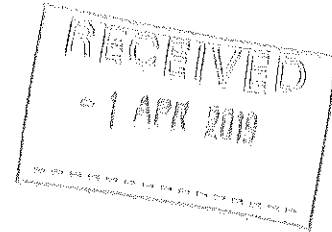


**Coimisinéir um Fhaisnéis Comhshaoil**  
**Commissioner for Environmental Information**

**Our reference:** CEI/16/0041, CEI/17/0017, CEI/17/0033

**Your reference:** FPL/113/02632

FP Logue  
Solicitors  
8-10 Coke Lane  
Smithfield  
Dublin 7



29 March 2019

**RE: Your Client Right to Know CLG - Appeals under the AIE Regulations in CEI/16/0041,  
CEI/17/0017, CEI/17/0033**

Dear Dr Logue,

I refer to your letter of 26 March in response to ours of 22 March 2019 concerning the following cases:

- CEI/16/0041 (Right to Know CLG and Department of Defence) concerning a request to the Department for a spreadsheet of all travel undertaken by the Ministerial Air Transport Service, including flights by any aircraft relating to travel by President Mary McAleese and President Michael D Higgins from 11 November 1997 to date of the request.
- CEI/17/0017 (Right to Know CLG and Office of the Secretary General to the President) concerning a request to the Office of the Secretary General to the President (OSGP) for a copy of all records relating to a speech given by President Higgins in Paris in July 2015 at the Summit of Consciences for the Climate and an address given by President Higgins at the New Year's Greeting Ceremony in January 2015.
- CEI/17/0033 (Right to Know CLG and Office of the Secretary General to the President) concerning a request to the OSGP for environmental information held by the Council of State relating to the Planning and Development Bill 1999 (the Planning and Development Act 2000) and section 24 of the Housing (Miscellaneous Provisions) (No 2) Bill 2001 (the Housing (Miscellaneous Provisions) Act, 2002).

We have considered what you say about the proposed invitation for further submissions. However, we consider it appropriate to put certain matters to all parties and invite any submissions they wish to have considered. What is being done is an integral part of the ongoing work towards bringing these cases to the Commissioner for determination. Please be assured that we are not engaging in "further rounds of submissions" in order to delay the

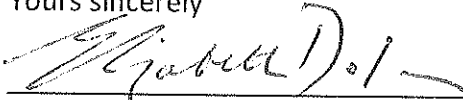


process. Resources are already devoted to ensure that the cases are finalised as early as possible following a thorough review.

Please find attached an appendix which is being sent to each party setting out first new matters which have arisen. Secondly, in the particular circumstances of these cases, including the length of time they have been under consideration and potential overlap in the issues between the cases, we are also taking this opportunity to recap on points argued by the parties.

As indicated above, the Commissioner's intention is to finalise these cases at the earliest possible date and it is unlikely that we will be in a position to facilitate requests for extensions of time for responses. I would ask that any submission you wish to have considered be received by this Office within 10 working days of the date of this letter i.e. by close of business on **Friday 12 April 2018** please.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'Elizabeth Dolan', written over a horizontal line.

Elizabeth Dolan

Senior Investigator

Office of the Commissioner for Environmental Information

## **Appendix: Notification of new matters & recap on points argued by the parties**

### **Exemptions to release of information in CEI/16/0041**

The following new matters have arisen in respect of CEI/16/0041:

- It is now claimed that the information requested is exempt from disclosure under article 8(a)(i) of the AIE Regulations as its disclosure would amount to release of personal information relating to natural persons who have not consented to disclosure and that the confidentiality of this information is otherwise protected by law. It is said that the interests of the President and the former President could be adversely affected if the information was disclosed and the information should not be disclosed without their explicit consent.
- As all parties are aware, it has been claimed that the information requested is exempt from disclosure under article 8(a)(ii) of the AIE Regulations as disclosure would adversely affect the interests of the President. In relation to that argument, the following facts have been submitted:
  - That the information was not produced by the Department. It originated from, and was derived directly from, information originally provided by the OSGP pursuant to the President's external relations functions and thus falls under the exemption in article 8(a)(ii) of the AIE Regulations.
  - By virtue of Article 13 of the Constitution, the President cannot be compelled to provide information in respect of the exercise and performance of his/her functions. It follows that as the President is not capable of being under a legal obligation to provide the information, the President voluntarily provided the information at issue and no consent has been given by the President to the release of the information. Some or all of the information does not relate to emissions so that article 10(1) of the AIE Regulations does not apply.
  - It has been counter argued that this exception is not intended to shield a person from disclosure simply because it would not be in their private interest.
- As all parties are aware, it has also been claimed that the information requested is exempt from disclosure under article 9(1)(a) of the AIE Regulations as disclosure would compromise the security of the President. In relation to this argument, the following facts have been submitted:
  - That the release of the information when combined with other information which is available could expose vulnerabilities in the President's pattern of travel and constitute a security threat. The UK Information Commissioner's decision in Decision Notice FS50368290 (Metropolitan Police) and the UK Information Commissioner's guidelines on regulation 12(5)(a) of the Environmental Information Regulations 2004 (SI 2004 No. 3391) (the UK equivalent to the AIE Regulations) are referred to in support of this position.
  - Disclosure would be contrary to the public interest for reasons of public defence and public security. The information requested reveals little or nothing about the state of the environment or the level of emissions. It is argued that the public interest in disclosure of the information is negligible.

## Recap of matters previously notified

I take this opportunity to provide a recap of matters previously raised and notified in this case. In no particular order these matters include:

- That the Office of the President does not fall within the definition of "public authority" set out in article 3(1) of the AIE Regulations. In relation to this issue, it has been claimed that:
  - The President is not a part of the "government or other public administration" within the meaning of article 3(1)(a) as that article is intended to capture public administrative bodies which can be seen from the juxtaposition of the term with 'Government' and the list of bodies cited in article 3(1). The President also does not perform "public administrative functions" within the meaning of article 3(1)(b) which is intended to capture the performance of executive functions by parts of the executive and this is supported by the use of the word "administrative".
  - It has been counter argued that the President is a public authority under article 3(1)(a) and/or (b) of the AIE Regulations, because the President forms part of the Legislature and is the Head of State and has certain powers under the Constitution.
- As Article 13.8.1° of the Constitution makes no provision for review of the President within the meaning of Article 6 of the AIE Directive, and was in place at the time the Directive was adopted, the President is excluded from the AIE Regulations pursuant to Article 2(2) of the Directive. In relation to this issue, it has been claimed that:
  - The constitutional arrangements protecting the President from political and judicial scrutiny are deemed to be in the public interest and is accommodated in comparable legislation such as the Freedom of Information Act 2014.
  - Bodies integral to the Presidency namely, the Office of the Secretary General of the President (OSGP), the Council of State and the Presidential Commission meet the test of Article 2(2) of the AIE Directive and are excluded from the AIE Regulations. That EU law does not require, and it would be at odds with the Constitution, the inclusion of bodies integral to the Presidency within the definition of 'public authority'.
  - It has been counter argued that the President does not have full immunity pursuant to Article 13.8.1° of the Constitution and *State (Walshe) v Murphy* [1981] 1 IR 275 is cited. A decision on an AIE request is an administrative decision and does not fall under Article 13.8.1°. The Commissioner is not a court.
- Article 13.8.1° of the Constitution places all information relating to the President outside the scope of the AIE Regulations. In relation to this issue, it has been claimed that:
  - This constitutional provision cannot be avoided by seeking information indirectly from other bodies, rather than directly from the President.

- Article 13.8.1° of the Constitution defines the separation of powers and does not confer absolute secrecy on all information relating to the President.
  - It has been counter argued if this was the case, then only information relating to public authorities would be accessible under the AIE Regulations and this is not the situation (see Case CEI/16/0004 (Friends of the Irish Environment Limited and the Department of Agriculture, Food and the Marine), available at [www.ocei.ie](http://www.ocei.ie)).
- Whether the information requested is information on the Constitutional powers and functions of the President. In relation to this issue, it has been claimed that:
- The information requested is information in CEI/16/0041 on the powers and functions of the President (see section 3 of the Republic of Ireland Act 1948).
- S.I. No. 309 of 2018 excludes the President, the OSGP and the Council of State from the definition of 'public authority' in article 3(1) of the AIE Regulations. In relation to this issue, it has been claimed that:
- S.I. No. 309 of 2018 is merely declaratory and/or clarifies the pre-existing legal position. The AIE Regulations prior to S.I. No. 309 of 2018, when interpreted in light of Article 13.8.1° of the Constitution, and having regard to the double construction rule, exclude the President, the OSGP and the Council of State from the AIE Regulations.
  - S.I. No. 309 of 2018 has a retroactive effect, as opposed to a retrospective effect.
  - It has been counter argued that S.I. No. 309 of 2018 is invalid as its provisions are contrary to the AIE Directive, in particular Article 2(2) (see the Court of Justice of the European Union's (CJEU) judgment in Case C-378/17 *Minister for Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations Commission*).
- Information requested in CEI/16/0041 is not environmental information as the connection between this information and the environment is minimal and remote, so as to preclude a finding that the information falls within the definition set out in article 3(1) of the AIE Regulations. In relation to this issue, it has been claimed that:
- The definition is confined to information on matters affecting or likely to affect the environment. In addition, an aircraft movement cannot be said to have these effects nor does the use of a particular form of transport constitute an "activity" under article 3(1)(c) of the AIE Regulations.
  - It has been counter argued that no basis has been identified for departing from the approach taken in CEI/15/0007 (Ken Foxe and Department of Defence), available at [www.ocei.ie](http://www.ocei.ie)).

## FPLOGUE SOLICITORS

Our Reference: FPL/113/02632

Your Reference: CEI/16/0041, CEI/17/0017, CEI/17/0033

9 April 2019

### By email

Commissioner for Environmental Information  
18 Lower Leeson Street  
Dublin 2  
info@ocei.ie

### Access to environmental information and the Department of Defence/President/Council of State

Dear Sir

We refer to our correspondence under the above references.

Thank you for your letter dated 29 March 2019 enclosing an annex entitled "Appendix: Notification of new matters & recap on points argued by the parties" in reply to our letter of the 26 March 2019.

We set out below in brief our client's response to the points raised in that appendix.

We do not intend repeating our client's previous submissions in these cases.

### Case CEI/16/0041

1. The Department of Defence actively publishes<sup>1</sup> MATS information namely the dates of travel, time on board, route, department and details of passengers. In respect of passengers the office-holder using the Ministerial Air Transport Service/MATS is identified in each case whereas only the number of accompanying individuals is reported. This publication covers the period 2008 to date. This publication is consistent with your decision in *Mr Ken Foxe, Raidió Telefís Éireann and the Department of Defence* (Case CEI/15/0007, 7 June 2016) ("Ken Foxe").
2. It is noted that the Department of Defence did not appeal this decision to the High Court and it actively publishes this information which you previously identified as falling within the scope of the definition of environmental information.
3. Any arguments made that publication is prevented by article 8(a)(i), 8(a)(ii), or 9(1)(a) of the European Communities (Access to Information on the Environment) Regulations 2007 as amended cannot be correct in light of the active publication of similar information about other office holders, including An Taoiseach. No particular circumstances relating to the President appear to have been advanced by the Department of Defence.

<sup>1</sup> <https://www.defence.ie/ministerial-air-transport-service-mats>

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4. In the alternative and without prejudice the following points are made in relation to the individual exceptions cited:
  - a. With article 8(a)(i) of the national regulations, the Department of Defence has merely speculated that the current and former President "could" be adversely affected by release of the requested information. However, under article 8(a)(i) there **would** have to be such an adverse effect to engage this exception. In any event the President's official duties are generally public in nature and are often published in the press or on [www.president.ie](http://www.president.ie). Therefore, the President does not have an expectation of privacy in relation to the performance of official functions which require use of the MATS. In the alternative if the President was found to be using the MATS for unofficial purposes, he or she could not expect to have such information protected by 8(a)(i). In addition, even if this exception were found to be engaged the public interest nevertheless favours release.
  - b. The reliance on article 8(a)(ii) is misconceived. This exception is intended to protect whistleblowers or people making complaints about breaches of environmental law. The intention is that the subject of a complaint can't discover the identity of the complainant using the AIE Regulations since the possibility of this happening could discourage people from making such complaints and therefore harm the environment. The idea that through use of the MATS the President is voluntarily providing information to the Department of Defence and that his or her interests would be adversely affected by releasing that information is a bit of a stretch to put it mildly.
  - c. Similarly, the reliance on article 9(1)(a) is unexplained, particularly since the President does not have any substantive role in public defence or security. The reliance on UK guidelines and a UK Information Commissioner Decision Notice relating to an entirely different category of information confirms that this point is, at best, tenuous
5. It is not true that requested information reveals little or nothing about the environment. As you observed in **Ken Foxe** the distance travelled on an aircraft directly reflects the quantity of CO2 emissions generated. In fact, air travel is one of the most environmentally harmful modes of transport. In particular the amount of radiative forcing due to aviation emissions could be 2-4 times that based on the CO2 emissions alone. The European Commission has adopted specific measures aimed at reducing the climate change impact of aviation<sup>2</sup>. The public has a right to know the details of the use of environmentally harmful transport by public office holders including the President. They can judge whether the use of such transport is warranted in light of the purpose and available alternatives.

#### Recap of matters previously noted

6. The President is one of the three constituents of the Oireachtas, the legislature of Ireland, and therefore a public authority.
7. The review under article 6 of AIE Directive is not a review within the meaning of Article 13.8.1° of the Constitution. The review does not concern the exercise and performance of the President's powers and functions. The article 6 review simply concerns whether information should be released and/or how the AIE Regulations should be interpreted. There is no question that the President would have to participate personally in any such review or that the review would be concerned with complaints relating to the subject matter of any requested information.
8. Any request for information to the President, Council of State or the Office of the Secretary General to the President (**OSGP**) could be handled administratively by the latter office. Requests to government departments, including to the Department of An Taoiseach, and ensuing reviews are always handled by officials and there is never any suggestion that An Taoiseach or a Minister would have to personally answer to you or to a Court in relation to a

<sup>2</sup> [https://ec.europa.eu/transport/modes/air/environment/climate\\_change\\_en](https://ec.europa.eu/transport/modes/air/environment/climate_change_en)

request for access to environmental information. The same arrangements can be put in place for the President and the Council of State.

9. There is no concept of immunity for bodies "integral to the Presidency" and no immunity under the Constitution for such bodies.
10. Even if there was such an immunity the last sentence of article 2(2) of the AIE Directive is optional and not required by EU law.
11. Article 13.8.1° of the Constitution does not place all information relating to the President outside the scope of the AIE regulations. The Constitution does not put a cloak of invisibility around the President or other bodies related to his office. This conclusion is based on the plain meaning of the text of this provision of the Constitution. Equally no such meaning can be implied by this provision. In any event the Constitution cannot call into question the effectiveness of EU law including the AIE Directive (see *Right to Know CLG v An Taoiseach* [2018] IEHC 372 paragraph 73).
12. It is denied that the information requested is on the powers and functions of the President. The information concerns the use by the President of the MATS, speeches relating to climate change and the consideration by the Council of State of proposed environmental legislation. In any event there is no legislative barrier to accessing such information in principle.
13. SI 309 of 2018 is invalid since the restriction of the scope of the AIE Directive set out in the last sentence of article 2(2) of the AIE Directive is optional and therefore transposition is not necessitated by Ireland's membership of the EU. As such it is unconstitutional for the Minister to make such an SI. The double construction rule is of no assistance since an SI that has been made in breach of the Constitutional separation of powers does not fall to be interpreted at all and in any event must be interpreted in light of EU law in the first instance.
14. The OSGP is an FOI body for the purposes of the Freedom of Information Act 2014 and therefore under the doctrine of equivalence it must also be a public authority for the purposes of the AIE Directive (*Ms X and The Office of the Secretary General to the President, Information Commissioner Case 170151* 8 March 2018). In addition, there is no constitutional immunity within the meaning of the last sentence of article 2(2) of the AIE Directive for the Council of State or the President.
15. Without prejudice, the European Communities (Access to Information on the Environment) (Amendment) Regulations (SI No 309 of 2018) cannot be retroactive and retrospective in application. (*Sweetman v Shell E & P Ireland Ltd* [2018] IESC 58).
16. It would be repugnant to the Constitution to enact and have made secondary legislation calculated to determine a matter pending before a quasi-judicial body such as your Office (by analogy with *Buckley and Ors v Attorney General* [1950] IR 67).
17. You have already decided in **Ken Foxe** that the requested information is environmental information, the arguments raised by the Department of Defence (which did not appeal that decision) constitutes an impermissible collateral attack on a decision in respect of which the appeal period has long since expired.
18. It is somewhat ironic that reliance is being place on secondary legislation enacted and made by the executive in breach of the Constitution and which interferes with a quasi-judicial procedure to justify refusing a request in order to protect the separation of powers.

These appeals have been pending for far too long.

While our client never suggested that another round of submissions was initiated by you to delay them further, this is nevertheless the inevitable result of this further procedural step.

Our client now expects an immediate decision and fully reserves its right to access a judicial remedy if there are further unwarranted delays.

Yours faithfully

FP Logue

FP LOGUE



## FPLOGUE SOLICITORS

Our Reference: FPL/113/02632

Your Reference: CEI/16/0041, CEI/17/0017, CEI/17/0033

3 May 2019

### By email

Commissioner for Environmental Information  
18 Lower Leeson Street  
Dublin 2  
info@ocei.ie

### **Access to environmental information and the Department of Defence/President/Council of State**

Dear Sir

We refer to the above matters which are now pending for 934, 728 and 605 days respectively.

Our client has a fundamental right to access environmental information on request at little or no cost. Such access must be granted within one month or exceptionally two. It also has a right to an expeditious and timely administrative appeal.

You as Commissioner for Environmental Information are bound by a duty of sincere cooperation which obliges you to take appropriate measures, general or particular to ensure the fulfillment of obligations arising under the Treaties and to refrain from any measure which would jeopardise the attainment of the European Union's objectives. In that regard you must ensure that your procedures are expeditious, timely and are compatible with the Charter of Fundamental Rights of the European Union.

We wrote to you on 20 March 2019 to ask you to make decisions on our client's appeals within 28 days failing which our client would seek a judicial remedy aimed at compelling you to make a decision. We received a short response on 22 March to which we replied on 25 March. You replied on the 29 March with an annex summarising the issues in the case, issues that the parties were already familiar with and had already had the opportunity to comment on, we replied to this letter on 11 April with the expectation of an immediate decision and reserving our client's rights. Since then there has been no further communication from your office.

Our client is fed up with this ducking and diving. The delays in these appeals are inexcusable and unexplained. Our client has had to incur additional costs and resort to threats of legal proceedings just to get to this point.

Unless decisions are made within the next 28 days our client will issue proceedings per our letter of 20 March 2019.

Whether or not a decision is made in that time our client is entitled to pecuniary and non-pecuniary damages for breaches of its fundamental right of access to environmental information, right to an expeditious administrative remedy and its right to an effective remedy and a fair trial. We would kindly

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ask you to include in your response to this letter your proposal in relation to compensating our client for these breaches and for the additional costs it has inevitably incurred in seeking to vindicate its rights.

Yours faithfully

FP Logue

FP LOGUE

**Our reference:** CEI/16/0041, CEI/17/0017, CEI/17/0033

**Your reference:** FPL/113/02632

FP Logue  
Solicitors  
8-10 Coke Lane  
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Dublin 7

9 May 2019

**RE: Your Client: Right to Know CLG - Appeals under the AIE Regulations in CEI/16/0041,  
CEI/17/0017, CEI/17/0033**

Dear Dr Logue,

I refer to the above referenced appeals to the Commissioner for Environmental Information and your recent correspondence to this Office of 3 May 2019.

We note what you say but apart from confirming that we are continuing to work on the cases with a view to having a decision or decisions made by the Commissioner by the end of May 2019, there is nothing that I can usefully add to my response of 29 March 2019.

I reject your allegation that there is any "ducking and diving" going on. It is not the threat of legal proceedings that has brought matters to this stage as is clear from our correspondence. Therefore, any attempt to recover costs for engaging in this correspondence will be resisted by the Commissioner. The Office has dealt with the cases as expeditiously as possible and to the best of its ability taking into account the complexity of the issues involved and the resources available to it.

Yours faithfully

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Elizabeth Dolan

Senior Investigator

## FPLOGUE SOLICITORS

Our Reference: FPL/113/02632

Your Reference: CEI/16/0041, CEI/17/0017, CEI/17/0033

30 May 2019

### By email

Commissioner for Environmental Information  
18 Lower Leeson Street  
Dublin 2  
info@ocei.ie

### **Access to environmental information and the Department of Defence/President/Council of State**

Dear Sir

We refer to the now rather lengthy chain of correspondence in relation to the three appeals listed above.

Thank you for your decision in case CEI/17/0017 *Right to Know and the President* dated 29 May receipt of which is gratefully acknowledged.

We also refer to our client's appeal dated 11 October 2016 against the Department of Defence under reference CEI/16/0041 and its appeal dated 5 September 2017 against the Council of State under reference CEI/17/0033. These appeals are now pending for 961 and 632 days respectively

So that our client may consider fully its position can you let us know when these two outstanding appeals are to be decided? It is imperative that our client knows the position in relation to these two outstanding appeals - it cannot be left in limbo wondering if they will follow quickly.

Our client fully intends pursuing a judicial remedy as set out in previous correspondence in the event that decisions in these remaining two appeals are delayed any further.

Yours faithfully



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Amel 16/18

**Lisa Underwood**

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**From:** Lisa Underwood  
**Sent:** Monday 17 June 2019 10:32  
**To:** 'fred.logue@fplogue.com'  
**Subject:** Re: Appeal under Access to Information on the Environment Regulations 2018 (the AIE Regulations) in CEI/17/0033  
**Attachments:** Decision CEI-17-0033 Signed.pdf

**Our reference:** CEI/17/0033

**Your reference:** FPL/113/02632

Dear Dr Logue

I refer to the appeal in CEI/17/0033 (Right to Know CLG and Office of the Secretary General to the President).

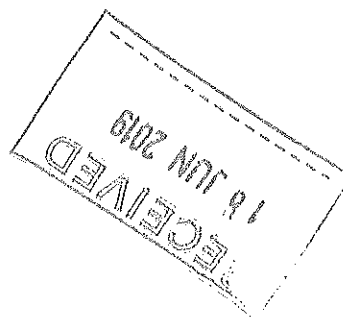
The Commissioner made a decision on the matter today, please find attached a scanned pdf copy of the decision. I have also put the signed hard copy of the decision in the post to you.

The Commissioner's decisions are published on this Office's website at [www.ocei.ie](http://www.ocei.ie). However, please note that there may be a short delay before the decision appears on the website.

A party to an appeal or any other person affected by this decision may appeal this decision to the High Court on a point of law arising from the decision, in accordance with the provisions of Article 13 of the Regulations. Such an appeal must be initiated not later than 2 months after notice of the decision is given.

Yours sincerely  
Lisa Underwood

Lisa Underwood | Investigator | Office of the Commissioner for Environmental Information | 18 Lower Leeson Street, Dublin 2, D02 HE97 | ☎ 01-639 5754 | ✉ [Lisa.underwood@ocei.ie](mailto:Lisa.underwood@ocei.ie) | Website: [www.ocei.ie](http://www.ocei.ie)







Coimisinéir um Fhaisnéis Comhshaoil  
Commissioner for Environmental Information

**Decision of the Commissioner for Environmental Information on an appeal  
made under article 12(5) of the European Communities (Access to  
Information on the Environment) Regulations 2007 to 2018 (the AIE  
Regulations)**

**CEI/17/0033**

**Date of decision:** 17 June 2019

**Appellant:** Right to Know CLG (appellant)

**Body Concerned:** Office of the Secretary General to the President (the OSGP)

**Issue:** Whether the OSGP was justified in refusing the appellant's request for access to a copy of records relating to two Bills which were considered by the Council of State, including a copy of any communications between the Council of State and the President, minutes of the meetings of the Council of State and any submissions, memoranda and briefing notes prepared with regard to the Bills, on the basis that the OSGP is not a public authority for the purposes of the AIE Regulations

**Summary of Commissioner's Decision:** The Commissioner found that, in the circumstances of this case, Article 13.8.1° of the Constitution precludes the Council of State and the OSGP from being subject to the review procedure under Article 6 of the AIE Directive. He found that for the purposes of this review, neither the OSGP nor the Council of State is a public authority within the meaning of article 3 of the AIE Regulations, as amended by S.I. No. 309 of 2018 European Communities (Access to Information on the Environment) (Amendment) Regulations 2018. Accordingly, he found that he has no jurisdiction to review the OSGP's decision on this AIE request.

**Right of Appeal:** A party to this appeal or any other person affected by this decision may appeal this decision to the High Court on a point of law from the decision, as set out in article 13 of the AIE Regulations. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

## **Background**

On 21 June 2017 the appellant emailed the following request to the general information email address for the President, and to two officials at the OSGP:

"I am seeking the following records held by the Council of State:

- copies of any submissions, memoranda, briefing notes prepared with regard to the following pieces of legislation, which were considered by the Council of State: the Planning and Development Bill 1999, Section 24 of the Housing (Miscellaneous Provisions) (No 2) Bill 2001.
- copies of the minutes of the council meetings held with regard to the above pieces of legislation,
- copies of any communications between the Council of State and the President with regard to the above pieces of legislation
- copies of any operating documents or terms of reference prepared in relation to the meetings outlined above."

On 21 July 2017 the appellant requested an internal review on the basis of the deemed refusal of the original request. The appellant received an acknowledgement from an official at the OSGP to its internal review request but no further response was forthcoming.

On 4 September 2017 the appellant appealed to my Office on the basis of the deemed refusal of its request at both decision-making stages.

I regret the delay that arose in dealing with this appeal. This case, and other related cases before my Office, raised complex legal points which required careful and detailed consideration. The difficulties were further compounded by the legal developments which arose during the course of this case.

I have now completed my review under article 12(5) of the AIE Regulations. In carrying out my review, I have had regard to the submissions of the parties and to:

- the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister's Guidance),
- Directive 2003/4/EC (the AIE Directive) upon which the AIE Regulations are based,
- the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention), and
- The Aarhus Convention—An Implementation Guide (Second edition, June 2014) (the Aarhus Guide).

I have also had regard to Bunreacht na hÉireann (the Constitution).

What follows does not make comment or findings on each and every argument advanced but all relevant points have been considered.

## **Scope of Review**

The appellant contends that its request in this case was made to the Council of State and that this is the relevant body for the purposes of this review. I consider, however, that the request was made to the OSGP. I note that the request was emailed to the general information email for the OSGP and to two officials of the OSGP. I am therefore satisfied that the OSGP is the body concerned in this case.



Article 12(3) of the AIE Regulations provides for a right of appeal to my Office where a decision by a public authority has been affirmed under article 11, i.e. on internal review. Article 11(5)(a) of the AIE Regulations clarifies that a decision to refuse a request, which may in turn be appealed to my Office, includes a request that "has been refused on the ground that the body or person concerned contends that the body or person is not a public authority within the meaning of these Regulations".

The OSGP submitted that it is excluded from the definition of public authority in the AIE Regulations. Accordingly, this review is concerned with the question of whether the OSGP is a public authority for the purposes of the AIE Regulations. For the sake of completeness, however, I will also address the status of the Council of State under the AIE Regulations.

### **Relevant Legal Provisions**

#### **The Constitution**

Article 13.8 of the Constitution provides that:

"1° The President shall not be answerable to either House of the Oireachtas or to any court for the exercise and performance of the powers and functions of his office or for any act done or purporting to be done by him in the exercise and performance of these powers and functions.

2° The behaviour of the President may, however, be brought under review in either of the Houses of the Oireachtas for the purposes of section 10 of Article 12 of this Constitution, or by any court, tribunal or body appointed or designated by either of the Houses of the Oireachtas for the investigation of a charge under section 10 of the said Article."

#### **Definition of Public Authority**

##### **The AIE Regulations**

Article 3(1) of the AIE Regulations provides that:

"'public authority' means, subject to sub-article (2)—

- (a) government or other public administration, including public advisory bodies, at national, regional or local level,
- (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment, and
- (c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within paragraph (a) or (b),

and includes—

- (i) a Minister of the Government,
- (ii) the Commissioners of Public Works in Ireland,
- (iii) a local authority for the purposes of the Local Government Act 2001 (No. 37 of 2001),
- (iv) a harbour authority within the meaning of the Harbours Act 1946 (No. 9 of 1946),
- (v) the Health Service Executive established under the Health Act 2004 (No. 42 of 2004),
- (vi) a board or other body (but not including a company under the Companies Acts) established by or under statute,

- (vii) a company under the Companies Acts, in which all the shares are held—
  - (I) by or on behalf of a Minister of the Government,
  - (II) by directors appointed by a Minister of the Government,
  - (III) by a board or other body within the meaning of paragraph (vi),
  - or
  - (IV) by a company to which subparagraph (I) or (II) applies, having public administrative functions and responsibilities, and possessing environmental information".

In *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51 (*NAMA*), available at [www.courts.ie](http://www.courts.ie), O'Donnell J. interpreted the structure of the definition of "public authority" as "reproducing the international and European law terms, and thereafter attempting to clarify the scope of application of those terms within the Irish legal system, rather than somehow extending them." Accordingly, clauses (i) to (vii) in article 3(1) do not extend the primary elements of the definition contained at paragraphs (a) to (c), which correspond to the definition of "public authority" as set out in Article 2(2)(a) to (c) of the Directive.

Article 3(2) of the AIE Regulations at the date the request was made, and when the appeal was made to my Office, provided that:

"Notwithstanding anything in sub-article (1), 'public authority' does not include any body when acting in a judicial or legislative capacity."

On 27 July 2018 the Minister for Communications, Climate Action and Environment signed S.I. No. 309/2018 - European Communities (Access to Information on the Environment) (Amendment) Regulations 2018 (the 2018 Regulations). The 2018 Regulations substituted article 3(2) with the following:

"Notwithstanding anything in sub-article (1), in these Regulations 'public authority' does not include—

- (a) the President,
- (b) the Office of the Secretary General to the President,
- (c) the Council of State,
- (d) any Commission for the time being lawfully exercising the powers and performing the duties of the President, or
- (e) any body when acting in a judicial or legislative capacity."

The Explanatory Note to the 2018 Regulations states that:

"The purpose of these Regulations is to amend the European Communities (Access to Information on the Environment) Regulations 2007 to clarify the status of certain offices."

#### The AIE Directive

Article 2(2) of the AIE Directive provides that:

"'Public authority' shall mean:

- (a) government or other public administration, including public advisory bodies, at national, regional or local level;
- (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and

- (c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b)."

The second paragraph of Article 2(2) of the AIE Directive provides that:

"Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition."

Article 6 of the AIE Directive provides that:

"1. Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.

2. In addition to the review procedure referred to in paragraph 1, Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. Member States may furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse.

3. Final decisions under paragraph 2 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this Article."

#### The Aarhus Convention

Article 2(2) of the Aarhus Convention provides that:

"'Public authority' means:

- (a) Government at national, regional and other level;
- (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
- (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;
- (d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity".

#### OSGP's Position

The OSGP submits that:

- Article 6 of the AIE Directive requires that applicants must have access to a review procedure before a court of law or another independent and impartial body.

- However, Article 2(2) of the AIE Directive provides that Member States may exclude institutions or bodies from the definition of "public authority" where national constitutional provisions make no provision for a review procedure of such institutions or bodies within the meaning of Article 6.
- Article 13.8.1° of the Constitution, which was in place at the time the AIE Directive was adopted, is one such constitutional provision as it precludes the President, the Council of State and the OSGP from being answerable to any court within the meaning of Article 6 of the AIE Directive.
- The President, the Council of State and the OSGP are therefore exempt from the definition of "public authority".

It submits that the President's immunity under Article 13.8.1° of the Constitution extends to bodies which are integral to the Presidency, including the Council of State and the OSGP. It states that designating the OSGP as a public authority for the purposes of the AIE Regulations "would inevitably make the President answerable to the courts". It says that "[t]his would clearly cut across the provisions of Article 13.8.1° of the Constitution." It also states that a review by the Commissioner is just one step in an appeals process which leads to the High Court. It asserts that drawing the President into such an appeals process, including through cases relating to records held by the Council of State and the OSGP, could lead to a constitutional incongruence whereby the President could find himself or herself before a court to which he or she cannot be answerable for the performance of his or her powers and functions or would be unable to represent his or her interests in a process where the court is the final arbiter of how the system works.

It states that EU law does not require the OSGP and the Council of State to be included in the definition of public authority, as the President and his or her Presidential bodies "demonstratively meet the test of Article 2.2 of the Directive allowing for the exclusion from the definition of 'public authority'."

In addition, it states that the inclusion of Presidential bodies is discretionary under Article 2(2) of the AIE Directive; therefore, the decision to include such entities is not necessitated by the obligations of European Union (EU) membership. It says that "the State had discretion to transpose EU law in a way that did not cause unnecessary constitutional offence". It states that including the President, the OSGP and the Council of State in the definition of public authority would have been "a clear affront" to Article 13.8.1° of the Constitution.

It also states that the 2018 Regulations only clarified and made explicit that the President, the Council of State and the OSGP were always excluded from the definition of public authority. It states that it understood that the omission of such entities from the list of bodies specified for inclusion in the definition of public authority in article 3(1)(i) to (vii) of the AIE Regulations or "the indicative list" of public authorities published by the Department of Communications, Climate Action and Environment meant that the Irish State intended that they be excluded from the definition of "public authority".

The OSGP also submits that, as the President forms part of the Legislature pursuant to Article 15 of the Constitution and "acts in a legislative capacity", he or she is exempt from the definition of "public authority" under article 3(2) of the AIE Regulations and the second provision in Article 2(2) of the AIE Directive.

### **Appellant's Position**

The appellant submits that the status of the President is not relevant to this case. Notwithstanding this, it submits that the President is a public authority under article 3(1)(a) or 3(1)(b) or both (except when acting in a legislative capacity). The appellant states that the

President is the Head of State and has certain powers under the Constitution. It accepts that the President forms part of the Legislature under Article 15 of the Constitution. However, the appellant rejects the claim that the President is acting in a legislative capacity in respect of the requested information on the basis the legislation that is the subject matter of the request has been passed by the Legislature. It cites the CJEU's judgment in *C-204/09 Flachglas Torgau GmbH v Federal Republic of Germany (Flachglas)*, available at [www.curia.europa.eu](http://www.curia.europa.eu), in support of its position. It also denies that the information requested is on the powers and functions of the President as the information concerns consideration by the Council of State of proposed environmental legislation.

The appellant also submits that a right of appeal under the AIE Regulations does not conflict with Article 13.8.1° of the Constitution. It submits that:

- The Commissioner is not a court for the purposes of Article 13.8.1°.
- Article 13.8.1° does not exclude an administrative review of a decision under the AIE Regulations and that a review under Article 6 of the AIE Directive is not a review within the meaning of Article 13.8.1°.
- Article 13.8.1° only provides the President with partial immunity for the exercise of his or her powers and functions of his or her office or for any act done or purporting to be done by him or her in the exercise and performance of those powers and functions.
- A decision on an AIE request is an administrative decision and cannot be considered to be an exercise of the President's powers and functions as set out in the Constitution.
- A review under Article 6 of the AIE Directive does not concern the exercise and performance of the President's powers and functions.
- The President would not have to participate in any such review.

In support of its position it cites *State (Walshe) v Murphy* [1981] 1 IR 275 (*Walshe*). It states that any request for information to the President, the Council of State or the OSGP could be handled administratively by the OSGP. It says that requests to Government Departments are handled by officials in the Departments and that there is never any suggestion that the relevant Minister would have to personally answer to a Court in relation to the request.

The appellant also asserts that the Council of State and the OSGP do not meet the criteria in the third provision of Article 2(2) of the AIE Directive that must be satisfied before a Member State can exercise this discretionary provision. It states that OSGP has been recognised as a public body for the purposes of the Freedom of Information Act 2014 (FOI Act). It contends that under the doctrine of equivalence Ireland cannot treat EU law rights less favourably than domestic rights. It concludes that the OSGP must, therefore, also be a public authority for the purposes of the AIE Regulations.

It also submits that Article 2(2) of the AIE Directive is a discretionary provision and that by not implementing it the Legislature decided not to exclude bodies or institutions for which Ireland's constitutional provisions do not provide for a review procedure. It states that "in deciding not to exercise the option [in Article 2(2)], the Oireachtas clearly intended that such bodies be included in the scope of what is a public authority." It also states, in reference to the Supreme Court's judgment in *NAMA*, that the indicative list of public authorities in article 3(1)(i) to (vii) of the AIE Regulations "does not expand or limit the definition of public authority and each case must be considered with reference to articles 3(1)(a), (b) and (c)".

In addition, it submits that the 2018 Regulations are invalid. It states that their provisions are contrary to the AIE Directive - in particular Article 2(2) of the Directive. It says that the provisions of the 2018 Regulations are not necessitated by the obligations of EU membership.

It states that any reliance by me on the 2018 Regulations to refuse access to the information would breach its fundamental right of access to the information requested. In support of its argument, it again cites the Supreme Court's judgment in *NAMA*. It also cites the CJEU's judgment in C-378/17 *Minister for Justice and Equality and Commissioner of the Garda Síochána*, available at [www.curia.europa.eu](http://www.curia.europa.eu).

### **Summary of Main Findings**

Due to the number of arguments which have been made in this case, it is helpful to provide the following general summary of my main findings before setting out my detailed analysis:

- The information requested in this case is information on the powers and functions of the President, specifically the President's legislative powers and functions under the Constitution.
- The President's immunity under Article 13.8.1° of the Constitution extends to the Council of State and the OSGP in this instance and both bodies are excluded from the definition of public authority under the AIE Regulations.

### **Analysis and Findings**

#### **Information on the Powers and Functions of the President**

As noted above, the appellant asserts that the requested information is not information on the powers and functions of the President. I disagree.

The request in this case was for a copy of information relating to two Bills, specifically the Planning and Development Bill 1999 (the 1999 Bill) and section 24 of the Housing (Miscellaneous Provisions) (No.2) Bill 2001 (the 2001 Bill). The 1999 Bill was referred to the Supreme Court by the President under Article 26 of the Constitution. The Council of State was convened in respect of the 2001 Bill in 2002.

Article 15.1.2° of the Constitution defines the Oireachtas as consisting of the President and the two Houses of the Oireachtas. Article 15.2.1° of the Constitution confers sole and exclusive legislative power on the Oireachtas. The President exercises certain key powers and functions in the legislative process. These are largely detailed between Articles 22 and 27 of the Constitution. All legislation passed by both Houses of the Oireachtas must be presented to the President for signature and promulgation under Article 25 of the Constitution. The President may, only after a consultation with the Council of State, refer any Bill, other than a Money Bill, to the Supreme Court for a determination as to whether the Bill, or any of its provisions, is repugnant to the Constitution under Article 26 of the Constitution. The information requested in this case concerns two Bills in respect of which the President convened the Council of State for the purpose of consulting with the Council under Article 26 of the Constitution. I find that the information requested in this case is information on the President's powers and functions of the President, specifically the President's legislative powers and functions under the Constitution.

It is noteworthy that if it were possible to make a request directly to the President for similar information relating to the President's constitutional legislative powers and functions to refer Bills to the Supreme Court under Article 26 of the Constitution, the President would likely fall under the exclusion for bodies acting in a legislative capacity in the second provision of Article 2(2) of the AIE Directive as transposed by article 3(2)(e) of the AIE Regulations. The circumstances of this case are distinguishable from those concerned in *Flachglas*. *Flachglas* concerned a Federal Ministry which is an executive body similar to a Department of State in Ireland, whereas the President forms part of the Legislature pursuant to the Constitution. I note that the Advocate General in her Opinion in *Flachglas* contrasted the position of such

executive bodies with bodies which, on a structural definition, form part of the Legislature. The Advocate General stated, at paragraph 73, that there is no temporal limitation to the exclusion from the definition of public authority for bodies which form part of the Legislature as their activities in that capacity have no beginning or end in time.

However, the issue at the centre of this case is whether the President's immunity under Article 13.8.1° of the Constitution for the exercise and performance of his or her constitutional legislative powers and functions extends to include the OSGP and the Council of State and thus excludes these bodies from being subject to the review procedure under Article 6 of the AIE Directive in accordance with the third provision of Article 2(2).

### **The 2018 Regulations**

Article 3(2)(b) of the AIE Regulations (as substituted by the 2018 Regulations) provides that the definition of public authority does not include the OSGP. Article 3(2)(c) of the AIE Regulations (as substituted by the 2018 Regulations) provides that the definition of public authority does not include the Council of State.

The AIE Regulations, including the 2018 Regulations, were made in the exercise of the power conferred by section 3 of the European Communities Act 1972 to give effect to the AIE Directive. The Recital to S.I. No. 133/2007 - European Communities (Access to Information on the Environment) Regulations 2007 (the 2007 Regulations) and to the 2018 Regulations, states that the Regulations were enacted for the express purpose of giving effect to the AIE Directive.

The Supreme Court in *NAMA* held, at paragraph 10, that in interpreting the AIE Regulations, it is not sufficient to have regard to national law and, in particular, the normal principles of statutory interpretation in Irish law. The AIE Regulations must be understood as implementing the provisions of the AIE Directive (and indirectly the Aarhus Convention) and, as a matter of constitutional law, ought not to go further (but not fall short of) the terms of the Directive. It stated that if, as a matter of domestic interpretation, the provisions of the AIE Regulations might appear to go further or fall short of what the AIE Directive requires, an Irish court might be required to adopt another interpretation which is consistent with the provisions of the Directive, if that is possible. Accordingly, the Court found that, in order to understand the AIE Regulations, it is necessary to understand exactly what the Directive does and means, which may also mean interpreting the provisions of the Aarhus Convention.

### **The Second Exclusion under Article 2(2) of the AIE Directive**

In Case CEI/17/0017 (Right to Know CLG and the Office of the Secretary General to the President), available at [www.ocei.ie](http://www.ocei.ie), I found that the jurisprudence of the Advocate General and the CJEU in *Flachglas* makes clear that there are two distinct exclusions in Article 2(2). The first exclusion applies when a body is acting in a judicial or legislative capacity. The second may apply when a Member State's constitutional provisions precluded a body's decisions from the review procedure prescribed in Article 6 of the AIE Directive at the time the AIE Directive was adopted. As I observed in Case CEI/17/0017, the purpose of the second exclusion to the definition of public authority, as set out in the third provision of Article 2(2), is to permit a Member State such as Ireland to preserve its constitutional order including the separation of powers between the organs of government.

### **The President's Constitutional immunity**

In Case CEI/17/0017, I accepted that the President's immunity under Article 13.8.1° of the Constitution excludes the President from the definition of public authority in article 3(1) of the AIE Regulations, as clarified by the amendment to the AIE Regulations by the 2018

Regulations. I also accepted that the exclusion of the President from the definition is consistent with the AIE Directive, specifically the third provision of Article 2(2).

I observed that Article 13.8.1° of the Constitution precludes the President from review by any court or under article 12 of the AIE Regulations. I considered that the President's immunity from review by the courts necessarily extends to review by any administrative review body, especially where a decision could result in judicial proceedings against the President, as would have been the situation in Case CEI/17/0017. That would also be the situation in this case. I was satisfied in Case CEI/17/0017 that the participation of the President in the appeal process under the AIE Regulations would be inconsistent with the President's immunity under Article 13.8.1° of the Constitution. As a result, I accepted that Article 13.8.1° of the Constitution precludes the President from the review procedure prescribed in Article 6 of the AIE Directive.

I find no basis for departing from my analysis in Case CEI/17/0017 in this case. Accordingly, I am satisfied that Article 13.8.1° of the Constitution precludes the President from the review procedure prescribed in Article 6 of the AIE Directive for the exercise and performance of the powers and functions of his or her office or for any act done or purporting to be done by him or her in the exercise and performance of his or her powers and functions.

#### The Office of the Secretary General to the President

In Case CEI/17/0017, I accepted that the OSGP, which is attached to the post of Secretary General to the President, both of which are attached to the constitutional office of the President, is integral to the exercise and performance of the powers and functions of the President. I noted that the OSGP was established to provide the President with the means necessary to carry out his or her powers and functions. I was satisfied that the President's immunity under Article 13.8.1° of the Constitution necessarily extends to include the OSGP when it is providing the President with the means necessary to carry out his or her powers and functions. I noted that a finding to the contrary would in effect mean that President's immunity is limited to the person of the President. I also noted the constitutional position of a Minister and the Minister's Department of State differs from that of the President and the Office established to provide the President with the means necessary to carry out his or her powers and functions. I further noted that the facts in Case 170151 (Ms X and The Office of the Secretary General to the President), available at [www.oic.ie](http://www.oic.ie), were distinguishable from those in Case CEI/17/0017. The facts in Case 170151 are also distinguishable from those in this case. I found that in the circumstances of Case CEI/17/0017 the OSGP was excluded from the definition of public authority in accordance with Article 13.8.1° of the Constitution, as explicitly clarified by article 3(2)(b) of the AIE Regulations. I further found that article 3(2)(b) was consistent with the AIE Directive, specifically the third provision of Article 2(2).

I have found above that the information requested in this case relates to the President's constitutional legislative powers and functions, specifically the President's power to refer Bills to the Supreme Court under Article 26 of the Constitution. It seems to me that, if the information is held by the OSGP, the OSGP only holds the information requested in its capacity of providing the necessary administrative support to the President in carrying out his or her powers and functions. I consider that compelling the President's officers to be answerable to me in a review under article 12 of the AIE Regulations, which is capable of leading to judicial proceedings before the courts, in respect of information relating to the exercise and performance of the President's powers and functions, would be inconsistent with the President's immunity pursuant to Article 13.8.1° of the Constitution.



For the reasons above, I find that insofar as the information requested relates to the exercise and performance of the President's powers and functions that the President's immunity for the exercise and performance of the powers and functions of his or her office or for any act done or purporting to be done by him or her in the exercise and performance of his or her powers and functions under Article 13.8.1° of the Constitution extends to include the OSGP. I am also satisfied that in the circumstances of this case the OSGP is excluded from the definition of public authority in article 3(1) of the AIE Regulations. Furthermore, in the circumstances of this case, I am satisfied that in explicitly excluding the OSGP from the definition of public authority, article 3(2)(b) of the AIE Regulations merely clarified this pre-existing legal situation and is thus consistent with the AIE Directive, specifically the third provision of Article 2(2). Accordingly, I find that the OSGP is not a public authority under the AIE Regulations for the purposes of this review.

### Council of State

As noted above, article 3(2)(c) of the AIE Regulations excludes the Council of State from the definition of public authority in the AIE Regulations.

The Council of State is one of the organs of government established by the Constitution. Article 31.1 of the Constitution provides that:

"There shall be a Council of State to aid and counsel the President on all matters on which the President may consult the said Council in relation to the exercise and performance by him of such of his powers and functions as are by this Constitution expressed to be exercisable and performable after consultation with the Council of State, and to exercise such other functions as are conferred on the said Council by this Constitution."

Article 32 of the Constitution provides that:

"The President shall not exercise or perform any of the powers or functions which are by this Constitution expressed to be exercisable or performable by him after consultation with the Council of State unless, and on every occasion before so doing, he shall have convened a meeting of the Council of State and the members present at such meeting shall have been heard by him."

Matters on which the President may consult with the Council of State are set down in the Constitution and include the President's power to refer Bills to the Supreme Court. Article 26.1.1° of the Constitution provides that:

"The President may, after consultation with the Council of State, refer any Bill to which this Article applies to the Supreme Court for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof."

The primary purpose of the Council of State is to aid and counsel the President on all matters on which the President may consult with it, including in relation to the reference of Bills to the Supreme Court under Article 26.1.1° of the Constitution. The information requested in this case relates to two Bills in respect of which the President convened the Council of State to aid and counsel him or her on pursuant to Article 26.

I accept that the President's immunity for the exercise and performance of the powers and functions of his or her office or for any act done or purporting to be done by him or her in the exercise and performance of his or her powers and functions under Article 13.8.1° of the Constitution necessarily extends to include the Council of State. The constitutional power to refer a Bill (other than a Money Bill) to the Supreme Court for a determination as to its constitutionality is vested in the President. Under Article 13.8.1 of the Constitution the

President is not answerable to any court for the exercise and performance of this duty. The constitutional duty of advising the President in relation to this legislative power and function is vested in the Council of State under Article 26 of the Constitution. A finding that the President's immunity under Article 13.8.1° of the Constitution does not extend to include the Council of State would not only limit the President's immunity to the person of the President but would undermine the Council of State's constitutional advisory role to the President and, in my view, would interfere with the exercise and performance of the President's powers and functions.

I note that Hamilton P. in *O'Malley v An Taoiseach and The Attorney General* [1990] I.L.R.M. 461 (*O'Malley*) cited Article 13.8.1° of the Constitution in refusing the application to prevent the Taoiseach from advising the President to dissolve Dáil Éireann. Hamilton P. stated that:

"The Constitution quite clearly gives the right to the Taoiseach to advise the President with regard to the dissolution of Dáil Éireann. The constitutional duty of dissolving the Dáil is vested in the President and he is not answerable to any court for the exercise and performance of this duty. The constitutional duty of advising the President in relation to this question is vested in the Taoiseach and in my opinion the Courts have no jurisdiction to place any impediment between the President and his constitutional advisor in this important matter, which is solely the prerogative of the President."

I am satisfied that due to the separation of powers between the organs of government I do not have jurisdiction to review any decision by the Council of State under article 12 of the AIE Regulations. To review any such decision would place an impediment between the President and his or her constitutional advisor, thereby interfering with the exercise and performance of the President's powers and functions. I consider that compelling the Council of State to be answerable to me in a review under article 12 of the AIE Regulations, which is capable of leading to judicial proceedings before the courts, would be inconsistent with the President's immunity for the exercise and performance of the powers and functions of his or her office or for any act done or purporting to be done by him or her in the exercise and performance of his or her powers and functions under Article 13.8.1° of the Constitution.

The appellant asserts that any request for information to the Council of State could be handled administratively by the OSGP. It states that requests to Departments are handled by officials in the Department and that the relevant Minister does not personally answer to the Court in relation to the request. However, the appellant's argument fails to address the fact that Ministers are responsible for the performance and functions of their Department and that the decisions by officials in his or her Department are treated as decisions of the relevant Minister. Thus, while the relevant Minister does not personally answer to the Court in relation to requests, he or she is responsible for the request and any actions taken by the Department. In any event, the constitutional position of a Minister and the Minister's Department of State differs from that the President, the Council of State and the Secretary General to the President who is the clerk of the Council of State.

While the Explanatory Note to the 2018 Regulations is not legally binding, I note that it states that the purpose of the Regulations is "to clarify the status of certain offices" under the AIE Regulations. It is likely that the Minister when enacting the 2007 Regulations did not envisage appeals against the President, the Council of State and the OSGP due to Article 13.8.1° of the Constitution. Presumably, it was considered that such clarification was needed as a result of this and other appeals which had been made to my Office. Thus, I accept that the Minister in making the 2018 Regulations clarified the pre-existing legal situation that the Council of State is excluded from the definition of public authority in article 3(1) of the AIE.

Accordingly, I accept that article 3(2)(c) of the AIE Regulations (as substituted by the 2018 Regulations) confirmed the situation which was, and is, that the President's immunity for the exercise and performance of the powers and functions of his or her office or for any act done or purporting to be done by him or her in the exercise and performance of his or her powers and functions under Article 13.8.1° of the Constitution extends to include the Council of State and is thus consistent with the AIE Directive in this case, specifically the third provision of Article 2(2).

For the reasons above, I find that the President's immunity in Article 13.8.1° of the Constitution extends to include the Council of State. I further find that the Council of State is excluded from the definition of public authority under the AIE Regulations, in accordance with 3(2)(c) of the AIE Regulations.

### **Referral**

The Court in *An Taoiseach v Commissioner for Environmental Information* [2010] IEHC 241 noted that it is open to me, as Commissioner for Environmental Information, to refer any question of law to the High Court pursuant to article 12(9)(a) of the AIE Regulations. At the time the decision in this case was appealed to me, my Office considered whether it was necessary to make a referral to the High Court in this, and other cases which raised similar issues, under article 12(9)(a) of the AIE Regulations. However after reviewing all the submissions in this case and the enactment of the 2018 Regulations, I concluded for the reasons outlined in this decision that it was not necessary to exercise my discretion.

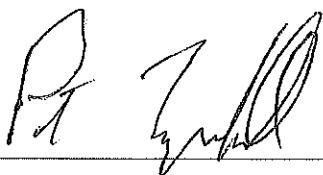
The appellant submitted that I ought to take into account the judgment of the CJEU in C-378/17 Minister for Justice and Equality and Commissioner of the Garda Síochána, available at [www.curia.europa.eu](http://www.curia.europa.eu). I have considered that case and am satisfied that it is distinguishable from the circumstances in the current case for the reasons set out above in my analysis of the relevant legal provisions.

### **Decision**

Having completed my review, I find that, in the circumstances of this case, the OSGP and the Council of State are excluded from the definition of public authority pursuant to Article 13.8.1° of the Constitution and article 3(2)(b) and (c) of the Regulations, and thus, neither is a public authority for the purposes of the Regulations. Accordingly, the OSGP was not obliged to process the appellant's request and I have no further jurisdiction in relation to this matter.

### **Appeal to the High Court**

A party to the appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.



Peter Tyndall

Commissioner for Environmental Information

17 June 2019



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## Orlagh Kehoe

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**From:** Terry Dunne  
**Sent:** 05 July 2017 17:40  
**To:** elizabeth.dolan@oic.ie  
**Cc:** Aoife Byrne; Orlagh Kehoe  
**Subject:** RE: AIE Regulations and information of the President

Many thanks for bringing this to our attention, Liz.

T.

Sent from my Windows 10 phone

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**From:** [elizabeth.dolan@oic.ie](mailto:elizabeth.dolan@oic.ie)  
**Sent:** Wednesday 5 July 2017 17:27  
**To:** [Terry Dunne](#)  
**Cc:** [Aoife Byrne](#); [Orlagh Kehoe](#)  
**Subject:** AIE Regulations and information of the President

Dear Terry

I am bringing this to your attention in the context of any proposed amendments to the AIE Regs. As you know, the definition of "public authority" in the Directive is as follows:

"'Public authority' shall mean:

- (a) government or other public administration, including public advisory bodies, at national, regional or local level;
- (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
- and
- (c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b).

Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition."

Notwithstanding Art 3(2), the AIE Regulations do not expressly exclude the Office of the President in the manner permitted by Article 2(2) of the Directive and the particular environmental information being sought in a current appeal that we have does not appear to involve the President acting in a judicial or legislative capacity or involve an exercise or performance of the powers and functions of the President insofar as these are set out in the Constitution.

Article 13.8.1° of the Constitution provides that the President is not answerable to any court or the Oireachtas for the exercise and performance of the powers and functions of his office or for any act done or purporting to be done by him in the exercise and performance of these powers and functions.

The Aarhus Guide (non-binding) suggests that the term "government"— "includes agencies, institutions, departments, bodies, etc., of political power — at all geographical or administrative levels."

It may be that in a current case that we are dealing with, the Commissioner will have to address this question. He has not yet decided what his position on the definition issue is but, for future cases, if the intention is that the President is not intended to be a public authority in any circumstances, the Department might wish to consider whether the issue can be put beyond doubt by expressly excluding the President from the definition in accordance with the Article 2(2).

I will let you know when the Commissioner determines the case which has arisen.

Best Regards

Liz